Office - Supreme Court, U. S.
FILED
MAR 26 1937
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 652

Supreme Court of the United States

OCTOBER TERM, 1936

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,

Appellants,

v.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.,

Appellees.

On Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANTS

JOSEPH G. GAMBLE,
J. BLANC MONROE,
MONTE M. LEMANN,
Attorneys for Appellants.

HAUSER PRINTING CO., NEW ORLEANS

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statement of the case	2
Specification of assigned errors to be urged	3
Provisions of challenged 1934 statute	5
The challenged statute contrasted with the prior statute	8
Effect of Louisiana statute upon chains operating solely or chiefly in Louisiana	9
Evidence as to operations of complainant and intervenors	10
Federal Trade Commission Reports negative any finding that increase in size gives advantage to larger chains	26
Evidence for defendants	28
General findings of fact bearing upon the operations of complainant and intervenors	34
Detailed findings of fact comparing operations of complainant and intervenors with local chains	34
Summary of argument	36
Argument	38
The Louisiana statute taxes operations outside the State	38
The Fourteenth Amendment precludes the State from imposing a tax on operations outside the State	41
A State cannot by language or indirection accomplish an unconstitutional purpose	49
The Louisiana statute cannot be supported on the theory that Louisiana taxes only what is in Louisiana by analogy to allocation	60
An opinion of the Attorney General of Louisiana impliedly recognizes the arbitrary character of the Louisiana statute as written	71
The Louisiana statute increases the Louisiana tax when Louisiana operations decrease if outside operations increase. This could never happen under an allocation statute	74
The Louisiana statute places all stores everywhere in the highest applicable brackets	75

Argument—Continued: Page

The Louisiana statute denies the equal protection of the laws to chains operating both within and without Louisiana. The statute was not designed to, and does not, protect independents against chains but discriminates among chains ---------- 76

If the Louisiana statute is upheld, a State may make its tax rates applicable to income and operations within the State depend upon factors outside the State. The result would be to permit the State in effect to exclude from the State persons or corporations operating outside the State and to convert the Union into a Confederation of States---- 81

The right of Louisiana to exclude a foreign corporation cannot be used as a basis for taxing it upon property that, by established principles, the State has no power to tax---- 88

Prohibition of size extending to operations outside the State may properly be accomplished only by National Legislation ---------- 90

If the Louisiana statute is valid, municipalities may adopt corresponding ordinances based on operations outside State, further assuring exclusion of foreign chains---------- 91

Every legitimate claim of Louisiana to lay tribute upon opertions within its borders is attained under the State income and franchise tax laws, the 1932 Chain Store Act, and the general license tax laws---------- 92

The invalidity of the Louisiana 1934 statute will leave the 1932 statute in effect---------- 93

Summary and conclusion---------- 99

Appendix:

Federal Trade Commission Report on gross profit and average sales per store of retail chains, Senate Document 178, 72nd Congress, 2d Session, Table 16----------103

Federal Trade Commission Report on sales, costs and profits of retail chains, Senate Document No. 40, 73rd Congress, 1st Session, Table 32----------104

Louisiana Chain Store Act of 1934, Act 51 of 1934, p. 251----105

Louisiana Chain Store Act of 1932, Act 19 of 1932, p. 125----111

Table of Cases:

Airway Corporation vs. Day, 266 U. S. 71---------- 66

Alpha Portland Cement Co. vs. Massachusetts, 268 U. S. 203-- 67

Atchison, etc. Railroad Company vs. O'Connor, 223 U. S. 280- 65

Baldwin vs. Missouri, 281 U. S. 586---------- 55

Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511---------- 85

Table of Cases—Continued: Page

Baltic Mining Co. vs. Massachusetts, 231 U. S. 68 67
Bethlehem Motors Corporation vs. Flynt, 256 U. S. 421 52
Beidler vs. So. Carolina Tax Commission, 282 U. S. 1 55
Blackstone vs. Miller, 188 U. S. 189 55
Colgate vs. Harvey, 296 U. S. 404 ..... 52, 81
Cooney vs. Mountain States Telephone & Telegraph Company, 294 U. S. 384 54
Cudahy Packing Co. vs. Hinkle, 270 U. S. 400 67
Delaware L. etc. Railroad Company vs. Pennsylvania, 198 U. S. 341 44
Educational Films Company vs. Ward, 282 U. S. 379 98
Fargo vs. Hart, 193 U. S. 490 75
Farmers Loan & Trust Company vs. Minnesota, 280 U. S. 204 55
Fidelity and Deposit Company of Maryland vs. Tafoya, 270 U. S. 426 ..... 49, 51, 88, 99
First National Bank vs. Maine, 284 U. S. 312 55
Fox vs. Standard Oil Company, 294 U. S. 87 97
Frick vs. Pennsylvania, 268 U. S. 473 ..... 54, 56, 58
Frick's Estate, In re, 277 Pa. 242 56
Hanover Fire Insurance Company vs. Carr, 272 U. S. 494 98
Hans Rees' Sons vs. North Carolina, 283 U. S. 123 68
Horn Silver Mining Company vs. New York, 143 U. S. 305 98
International Paper Co. vs. Massachusetts, 246 U. S. 135 66
Iselin vs. United States, 270 U. S. 245 72
Kansas City R. R. vs. Kansas, 240 U. S. 227 59
Lewis Publishing Co. vs. Morgan, 229 U. S. 288 72
Liggett vs. Lee, 288 U. S. 517 ..... 95, 97
Looney vs. Crane, 245 U. S. 178 65
Louisville, Etc. Ferry Co. vs. Kentucky, 188 U. S. 385 ..... 42, 45
Ludwig vs. Western Union Telegraph Company, 216 U. S. 146 65
Maxwell vs. Bugbee, 250 U. S. 525 ..... 54, 55, 56, 58, 59
Missouri vs. Gehner, 281 U. S. 313 51
National Life Insurance Co. vs. United States, 277 U. S. 508 ..... 50, 52
New York Life Insurance Company vs. Head, 234 U. S. 149 46
Provident Savings Association vs. Kentucky, 239 U. S. 103 42
Pullman Company vs. Kansas, 216 U. S. 56 65
Quaker City Cab Company vs. Pennsylvania, 277 U. S. 389 ..... 89, 98, 99
Railway Express Company vs. Virginia, 282 U. S. 440 98
Safety Deposit Trust Company vs. Virginia, 280 U. S. 83 41
Schuylkill Trust Co. vs. Pennsylvania, 296 U. S. 13 51
Stewart Dry Goods Company vs. Lewis, 294 U. S. 550 ..... 73, 87
Tax Commissioners vs. Jackson, 283 U. S. 527 97
Union Tank Line vs. Wright, 249 U. S. 275 75
Union Transit Company vs. Kentucky, 199 U. S. 194 46
United States vs. Bennett, 232 U. S. 299 90

Table of Cases—Continued:

Page

United States Glue Company vs. Oak Creek, 247 U. S. 321 97
Wallace vs. Hines, 253 U. S. 66 ..... 60, 61, 62, 63, 64
Ward vs. Maryland, 12 Wall. 418 82
Western Union Telegraph Company vs. Kansas, 216 U. S. 1 65

Statutes Cited:

Louisiana Chain Store Act of 1932, Act 19 of 1932 (see Appendix) 3, 8, 9
Louisiana Chain Store Act of 1934, Act 51 of 1934 (see Appendix) 2, 5, 6, 7, 9, 10
Louisiana Franchise Tax Statute (Act 8 of 1932, as amended by Act 18 of 1934, further amended by Act 25 of First Special Session of 1934, Act 20 of Third Special Session of 1934 and Act 10 of First Special Session of 1935) 93
Louisiana General License Tax Statute, Dart's Louisiana General Statutes, §8588, ff. 8631 93
Louisiana Income Tax Statute (Act 21 of 1934, as amended by Act 7 of Second Special Session of 1934 and Act 21 of First Special Session of 1935) 92
Robinson-Patman Act (Act of June 19, 1936, Public No. 692, 15 USCA 13) 90

Miscellaneous:

Attorney for Collection of Revenue (Louisiana), Opinion of Sept. 30, 1936 70
Attorney General (Louisiana), Opinion to Supervisor of Public Accounts, Nov. 24, 1936 72
Census of American Business, Chains and Independents (1933) 32
Census of American Business Wholesale Distribution: 1933 Vol. VI 32
Census of American Business Retail Distribution: 1933 by Areas 31
Census of Business, 1935, Retail Distribution, Vol. 4 32
Census of Retail Distribution for Louisiana, R-129 (1929) 32
Corporation Trust Company, Louisiana Tax Service, §44-501 70
Federal Trade Commission, Annual report for year ending June 30, 1935 ..... 26, 27
Federal Trade Commission Report on Sales, Costs and Profits of Retail Chains, Senate Document No. 40, 73rd Congress, 1st Session. (see Appendix) 27
Federal Trade Commission Report on Gross Profit and Average Sales per Store of Retail Chains, Senate Document No. 178, 72nd Congress, 2d Session. (see Appendix) 28
Prentice-Hall Louisiana Tax Service, §44045 72

No. 652

Supreme Court of the United States

OCTOBER TERM, 1936

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,

Appellants.

v.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.,

Appellees.

On Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the District Court of the United States for the Eastern District of Louisiana is reported in 16 F. Supp. 499 under the style of "Great Atlantic & Pacific Tea Company vs. Grosjean, Supervisor of Public Accounts, et al," and appears in the Record at page 256.

JURISDICTION

As this is a suit to restrain the enforcement of a

statute of the State of Louisiana, this Court has jurisdiction of an appeal taken directly from the decree of the three-judge Court, which sat below, by virtue of the provisions of Section 238 of the Judicial Code as amended, 28 USCA 345. Probable jurisdiction of the appeal was noted by this Court on February 1, 1937.

STATEMENT OF THE CASE

This case involves a new and far reaching idea in chain store taxation, which, if maintained, opens the door to the application of a similar theory to franchise, income and other taxes. The Louisiana statute the validity of which is challenged calculates taxes upon stores "or mercantile establishments" in Louisiana by reference to the number of stores "or mercantile establishments" operated under the same management, ownership or control within or without the borders of Louisiana, anywhere in the world. This is Act 51 of the Louisiana Legislature of 1934, a copy of which is printed in the appendix to this brief. The statute and the theory upon which it goes is without precedent. The importance of the case goes far beyond Louisiana. Since this suit was filed similar laws have been proposed for passage in several other states and in at least one city. It has been said that if the Louisiana statute is upheld and widely followed, "the era of the national chain is over" (49 Harvard Law Review 781). It may perhaps also be said that in that event the era of national corporations and also of firms or individuals doing business in more than one state is also over. Every state following the Louisiana statute may erect an economic barrier along its borders which would confine business within its own limits and exclude those doing business elsewhere. The Louisiana statute is not confined in its operations to corporations, but applies also to firms and individuals.

Many other states have statutes levying special taxes against chain stores, but all such statutes are based solely upon the number of units operating within the state. Louisiana previously had a statute of this character (Act 19 of 1932), of which a copy also appears in the appendix to this brief. The effect of the 1934 statute, the validity of which is challenged in this case, was to enormously increase the rate of taxes on chains doing business in other states and to greatly reduce the rate of taxes on chains doing business only in Louisiana.

The original bill of complaint to enjoin the enforcement of the 1934 statute was brought by The Great Atlantic & Pacific Tea Company. Intervening bills were filed by twelve other corporations affected by the Louisiana statute. A temporary restraining order was issued after notice. By agreement of counsel an order for an interlocutory injunction was issued by a duly constituted three-judge court. The record was made up in accordance with a stipulation entered into by counsel (R. 81-87) which reserved all objections to the competency of testimony upon any ground other than form. The three-judge court on July 24, 1936 entered a final decree, denying the application for a permanent injunction and dismissing the bill of complaint. Findings of fact and conclusions of law were made substantially in accordance with the recitals in the opinion (R. 263). The order granting the appeal continued the interlocutory injunctions in effect until the final determination of the case in this Court (R. 279).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The assignment of errors, all of which will be urged, will be found in the record at page 275. The following is

a summary of the points under which appellants' contentions may be grouped:

The challenged Louisiana statute violates the Fourteenth Amendment to the Constitution of the United States by taxing property and operations beyond the jurisdiction of the State.

The challenged statute is void because it requires one operating a store or mercantile establishment in Louisiana to pay increased taxes to Louisiana by virtue of what is done outside Louisiana. It goes so far as to require one who actually **decreases** operations **within** Louisiana to pay **increased** taxes to Louisiana because of what is done **outside** Louisiana.

The Louisiana statute is especially arbitrary in taxing operations outside Louisiana irrespective of the remoteness of those operations and of their character and connection with operations within Louisiana, and in proceeding upon the theory that mercantile establishments are fungible and that all establishments everywhere are of the same character and value.

The Louisiana statute does not represent any policy to protect, and was not designed to and does not in fact protect, independent merchants against chains. It imposes upon the complainant and each of the intervenors a rate of tax for what is done in Louisiana far exceeding the rate imposed upon competitors operating more units and doing greater business in Louisiana, and thereby denies to complainant and intervenors the equal protection of the laws.

The statute cannot be maintained without conceding to the State of Louisiana a corresponding power in other forms of taxation, such as income, franchise and sales tax-

es, the effect of which would be to permit the State to erect economic barriers along its borders and, by discriminatory taxation, to exclude those engaged in operations elsewhere.

The challenged Louisiana statute burdens and interferes with interstate commerce and particularly so in its application to the mail order business of intervenors Montgomery Ward & Company and Sears Roebuck & Company.

Provisions of Challenged 1934 Statute

By Section 2 of Act 51 of the Louisiana Legislature, 1934 it is provided:

> "That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

Section 3 of said Act provides:

> "That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:"

Here follows a schedule of rates in sixteen separate steps or brackets imposing taxes upon the classes and at the rates as follows:

Rates Under 1934 Statute

Bracket	*Total Stores and Mercantile Establishments Operated everywhere*	*Tax on Louisiana Stores and Mercantile Establishments*
1	1 to 10	$ 10.00 per store
2	11 to 35	15.00 " "
3	36 to 50	20.00 " "
4	51 to 75	25.00 " "
5	76 to 100	30.00 " "
6	101 to 125	50.00 " "
7	126 to 150	100.00 " "
8	151 to 175	150.00 " "
9	176 to 200	200.00 " "
10	201 to 225	250.00 " "
11	226 to 250	300.00 " "
12	251 to 275	350.00 " "
13	276 to 300	400.00 " "
14	301 to 400	450.00 " "
15	401 to 500	500.00 " "
16	Over 500	550.00 " "

The following table summarizes the number of establishments operated by the parties to this suit everywhere, the number of stores operated in Louisiana, the tax rate per establishment under the 1934 statute and the tax rate per establishment which would be applicable under the statute if only the Louisiana stores were used as the basis for determining the rate of tax.

Name	Kind of Business	Establishments Everywhere	Establishments in Louisiana	Tax Per Establishment Under 1934 Act	Tax Per Establishment if Based Only on Stores in Louisiana
The Great Atlantic & Pacific Tea Company	Grocery & Meat	15,084	106	$550	$50 (R. 264)
Consolidated Millinery Co.	Leased Millinery Departments	217	5	250	10(R.98-101,268)
W. T. Grant Company	Ltd. Price Variety Stores	465	5	500	10 (R. 102, 268)
H. L. Green Company	Ltd. Price Variety Stores	127	1	100	None(R.113,266)
G. R. Kinney Co.	Shoes	330	3	450	10 (R. 268)
Liggett Drug Co.	Drugs	452	6	500	10 (R. 267)
Montgomery, Ward & Co.	Mail Order, Dept. & Other Type Establishments	517	5	550	10 (R. 266)
J. J. Newberry Co.	Genl. Mdse.	431	2	500	10 (R. 144)
J. C. Penney Co.	Genl. Mdse.	1,474	8	550	10 (R. 268)
Scott Burr Stores Corp.	Ltd. Price Variety Stores	135	3	100	10 (R. 268)
Sears, Roebuck & Co.	Mail Order, Dept. & Other Type Establishments	436	4	500	10 (R. 267)
Wohl Shoe Co.	Leased Shoe Departments	232	6	300	10 (R. 168-a)
F. W. Woolworth Co.	Ltd. Price Variety Stores	2,634	14	550	15 (R. 170,267)

This table illustrates the controlling effect which the 1934 Louisiana statute gives to foreign establishments in fixing the tax rate. In some instances over 95% of the total tax results from the effect given to establishments outside the State.

The purpose and effect of the 1934 statute was to reach operations of chains outside Louisiana **so as to produce revenue for Louisiana by an extra-territorial tax and at the same time to discriminate in favor of local chains** by reducing the rates applicable to a local chain and increasing the rates applicable to a foreign chain even

though the local chain may, and in many instances does, operate far more extensively in the State than does the foreign chain. The inference appears quite clear upon the record that except for the discrimination which it established in favor of local chains and except for the active efforts of the local chains, the Louisiana statute of 1934 would not have been passed.

The Challenged Statute Compared with the Prior 1932 Statute

The Louisiana statute of 1932, like every other chain store statute, provided for the calculation of rates upon the basis of stores situated within the state. The units in Louisiana were grouped into brackets and each group took a different rate (R. 264). The law was not retrogressive. The following table shows the brackets and rates of the 1932 statute:

Bracket	*Total Stores In Louisiana*	*Tax per Store*
1	1 to 5	$ 15.00
2	6 to 10	25.00
3	11 to 15	30.00
4	16 to 20	40.00
5	21 to 25	50.00
6	26 to 30	60.00
7	31 to 35	70.00
8	36 to 40	80.00
9	41 to 45	90.00
10	46 to 50	100.00
11	Above 50	200.00

Complainant, The Great Atlantic & Pacific Tea Company paid under the 1932 statute only $15 per store on units up to 5. The tax was increased by $5 for every additional bracket of 5 stores until the number of units reached 50, after which the tax became $200.

The total increase in taxes effected by the 1934 statute is indicated by the following table which shows the total taxes payable by complainant and intervenors under the

1934 Louisiana statute as compared with the taxes payable by them under the 1932 statute. In this table complainant is referred to as Company A, and the intervenors are referred to under succeeding letters corresponding to the alphabetical order of their respective names:

Company	Stores and Establishments in Louisiana	Tax Payable under 1932 Statute	Tax Payable under 1934 Statute
A	106	$14,000	$58,300
B	5	75	1,250
C	5	75	2,500
D	1	None	100
E	3	45	1,350
F	6	100	3,000
G	5	75	2,750
H	2	30	1,000
I	8	195	4,400
J	3	45	300
K	4	60	2,000
L	6	100	1,800
M	14	320	7,700

This table illustrates the extent to which the 1934 Louisiana statute taxes the plaintiff and intervenors by virtue of their operations outside the State. Companies B, C and G each have 5 stores in Louisiana, but Company B pays Louisiana taxes of $1,250, while Company C pays $2,500, or twice as much, and Company G pays $2,750. Company F and Company L each have 6 stores in Louisiana, but Company F pays Louisiana $3,000, while Company L pays only $1,800. Company E and Company J each have only 3 stores in Louisiana, but Company E pays Louisiana $1,350 while Company J pays only $300.

Effect of Louisiana Statute Upon Chains Operating Solely or Chiefly In Louisiana

The following table illustrates the effect of the 1934

Louisiana statute in lowering the taxes upon certain chains operating solely or chiefly in Louisiana:

Name of Company	Total Stores	Stores in Louisiana	Tax Under 1932 Statute	Tax Under 1934 Statute
Hill Stores	87	87	$10,200	$2,610
Katz & Besthoff, Ltd.	10	10	200	100
Morgan & Lindsey	45	28	980	355

It will be noted that the 1934 statute reduced the taxes of Morgan & Lindsey almost **two-thirds**, cut in **half** the taxes of Katz & Besthoff, Ltd. and reduced by **seventy-five per cent** the taxes of Hill Stores.

Evidence As To Operations of Complainant and Intervenors

The Great Atlantic & Pacific Tea Company (R. 85-98) and its affiliated companies operate in the United States 14,705 retail units and in Canada 279 units. In Louisiana the number of units operated as of March 2, 1935 was 106, of which 63 were in the City of New Orleans. Outside Louisiana the units were scattered through 38 states, the District of Columbia and Canada. The stores in various sections of the country vary as to the character of merchandise, depending upon local tastes and customs, standards of living and other factors. Each store must be designed in size, character and nature of the merchandise to meet the conditions in the trading area in which it is located. Similarly there is a wide variation in store operating results due to the effect of many local factors including consumers' purchasing power, expense of operation, price levels in the community, local laws and taxes, population in trading area, competency of personnel, etc. Foodstuffs that sell in some parts of the country are not desired in other sections and from locality to

locality there is a variation in items which must be stocked and can be sold. The stores vary widely in amount of sales and profits and there is no consistent ratio between sales and profits in the various stores either from year to year or from section to section. The number of items sold varies from approximately 800 items in some stores to approximately 1250 items in other stores where meat is not sold. In combination stores the number of items varies from approximately 1150 to approximately 1800. The number of employes per store varies from 1 regular employe in some stores to 20 in other stores with a few stores having substantially more employes. The annual sales per store vary from about $13,500.00 to over $125,000.00 and the sales of a few stores, all outside Louisiana, run very much higher, one store having sales of over $800,000.00 per year. In Louisiana, the total sales per store were approximately as follows, the years being the Company's fiscal years:

1931	$49,000.00
1932	38,000.00
1933	38,000.00
1934	42,000.00

The average sales per store in 1934 for stores everywhere was almost $55,000.00.

In Louisiana, the net profits per store after expenses and taxes (including U. S. income taxes) were approximately as follows:

1931	$390.00
1932	290.00
1933	550.00
1934	770.00

In the year 1934, the net profits per store of all the stores was approximately $1000.00.

In New Orleans, the operations of the plaintiff are in every important respect the same as those of H. G. Hill Stores, Inc. which operates 87 stores in New Orleans as against 63 operated by the plaintiff. The Atlantic & Pacific Stores and the Hill Stores carry about the same lines of merchandise and their merchandising methods are practically the same, though Hill Stores advertise more extensively than does the Atlantic & Pacific. The gross volume of the sales of the Hill Stores in New Orleans is very much greater than the gross volume of the plaintiff's stores. The Hill Stores have more locations and the majority of the stores do more business per store than the stores of the Atlantic & Pacific. In many cases, Hill and Atlantic & Pacific have a store in the same square and in most of such cases the Hill Store in the square sells more goods than the A. & P. store in that square. The figures as to gross sales reported for the purposes of general license taxes by Hill and A. & P. show that in 1934, in **27 cases out of 30, where A. & P. and Hill have stores in the same block or within a block of each other, each Hill store does a materially larger volume of business than the neighboring A. & P. store.** In 1933, similar figures show only 1 case out of 28 in which an A. & P. store situated within a square of a Hill store did more business than the Hill store. **In 1934, the Hill Stores in New Orleans reported aggregate gross total sales having a maximum of $5,515,000.00 as against a corresponding figure of $1,225,000.00 for the A. & P. In 1933 the corresponding figures were $4,716,000.00 for Hill and $1,860,000.00 for A. & P.**

The Hill Stores under the Louisiana statute pay $30 per store, while A. & P. is required to pay a maximum of $550 per store on every store. The extent of the discrim-

ination established by the tax is illustrated by the fact that the average rental paid by the A. & P. in New Orleans for a store is $77 per month, or $924 per year, while the discrimination in tax between A. & P. and Hill amounts to $520 per store or well over half a year's rental.

As of February 10, 1936 the A. & P. operated 109 stores in Louisiana, of which 66 were in New Orleans and 9 were in Shreveport. In the towns in Louisiana in which the A. & P. operate, other food chains operate 197 stores; independent grocers operating under one general supervision and pooling their purchases operate 128 stores; and entirely independent grocers operate 2,820 stores.

Liggett Drug Company, Inc., (R. 125-135) a Delaware corporation and its subsidiaries operate 452 stores situated in 32 states and the District of Columbia, of which 6 stores are located in Louisiana, 3 being in New Orleans and 1 each in Shreveport, Baton Rouge and Alexandria. In New Orleans the Liggett stores are in direct competition with three local chains, and in Shreveport, they are in competition with one local chain. One of the local chains, Katz & Besthoff, Ltd. operates 10 stores in the State of Louisiana, or almost twice as many as Liggett. All the Katz & Besthoff stores are in New Orleans. Under the Louisiana statute, each of the 10 Katz & Besthoff stores is required to pay a chain store license tax of $10 per store, while the Liggett Company is required to pay $500 for each of its 6 stores. Katz & Besthoff maintain much larger inventories and have much larger warehouse facilities than Liggett's stores in Louisiana or any comparable Liggett stores elsewhere. Katz & Besthoff reported for general mercantile license tax purposes for the City of New Orleans for the year 1934 aggregate minimum sales of $1,225,000 and aggregate maximum sales of

$1,775,000 as compared with Liggett's aggregate minimum sales of $216,000 and aggregate maximum sales of $260,000.00. The Liggett store at 840 Canal Street in 1934 had a sales volume not exceeding $110,000, while the Katz & Besthoff store right across the street at 841 Canal Street, had an aggregate sales volume not exceeding $345,000. The Liggett Store at 1001 Canal Street reported sales at not exceeding $85,000, while the Katz & Besthoff store at 732 Canal Street, three blocks away, reported sales not exceeding $205,000. The Liggett Store at 200 St. Charles Street reported sales not exceeding $65,000, while the Katz & Besthoff store, two blocks away at 235 Carondelet Street, reported sales not exceeding $85,000. Katz & Besthoff, Ltd. buy in large quantities so that they are able to get the same discounts as Liggett and **buy as cheaply as Liggett.** In the drug trade, quantity discounts do not become any greater after a certain point is reached. Usually the maximum quantity discount would be obtainable in purchasing in gross lots, and one purchasing 1000 gross would get no better discount than one purchasing 100 gross. Katz & Besthoff, Ltd. sell at the same prices as Liggett. Katz & Besthoff, Ltd. themselves manufacture and put up and sell under their own names a large number of items on which they make a special profit, and their profit on such items is as large as Liggett's profits on items on which Liggett has the exclusive agency in Louisiana, if not larger. Katz & Besthoff, Ltd. have the advantage of local acquaintance and contact and close personal supervision and management. Liggett is subjected to considerable expense for supervision which is not required by Katz & Besthoff, Ltd., and the direct management of the owners residing in Louisiana is not only cheaper but more efficient and effective. Katz & Besthoff drug stores are organized and operated as effectively as any drug chain can

be. They have every advantage of quantity buying, buying for cash and obtaining cash discounts, skill in buying, stock in stores, warehousing of goods, supply of capital, pricing and sales policy, accounting methods, uniformity in store management, display and advertising and standardization which Liggett or any other chain has or could have. In addition, they have the great advantage of being a local institution.

Approximately 25% of Liggett's sales in Louisiana are soda fountain sales, including sandwiches. Approximately 85% of the supplies for this business are bought locally, the ingredients being ice cream, milk, bread, meat, etc. Katz & Besthoff, Ltd. and the other local drug chains do a larger soda fountain business than does Liggett and buy supplies locally in larger quantities.

The net income of the 6 Liggett stores in Louisiana in 1934, after deducting Federal taxes, was $17,725. The net income in that same period of Katz & Besthoff's stores was not known to witnesses for the intervenor, but could be ascertained from the State of Louisiana income tax returns filed with the defendant Supervisor and known to her.

Economical Drug Stores, Inc. is a local chain which operates 15 drug stores in the city of New Orleans in direct competition with Liggett. They also have the advantage of large purchasing power and chain store organization, and obtain the best quantity discounts and enjoy the advantage of local management and supervision. These circumstances also apply to American Drug Company, Inc., which operates 5 drug stores in the city of New Orleans, and Morris and Dickson Company, which operates 2 stores in Shreveport.

In 1934 Liggett's net percentage of earnings on sales in Louisiana was .0296 cents per dollar of volume. This percentage was exceeded by the earnings in the States of Alabama, Mississippi and Florida in the Southern territory and is very closely followed by the State of Georgia. In seven other states and the District of Columbia the percentage of profit exceeded the percentage of profit in Louisiana. In eleven other states, in which there were profits in 1934, the percentages of profit were lower than in the State of Louisiana, while in ten other states no profits were made. A comparison of percentages in twenty-three states and the District of Columbia, in which the stores operated at a profit, shows Louisiana to be twelfth in the percentage of earnings per dollar of sales.

Many circumstances enter into the percentage of profits depending upon the conditions prevailing in different cities and states, such as competitive conditions, including the number of competing stores and type of competition, desirability and character of the location, type of neighborhood or community, kind and quality of merchandise generally used and sold in such community or neighborhood. The major factor is the financial and employment conditions existing in each city. The type and character of the business done is also important; for example, the gross profit in the sale of cigars and cigarettes is extremely small, and in those stores in which these items furnish a large proportion of the business, the percentage will be lower than the percentage of the stores in which the bulk of the business is in other items. The State of Louisiana and the cities in Louisiana have a number of varied and different kinds of licenses and taxes, and the taxes and license fees paid by the Liggett Drug Company in Louisiana (not including any chain store tax)

exceed the average of taxes paid in other states and cities.

Montgomery Ward & Co., (R. 136-143), an Illinois corporation, operates 9 mail order establishments engaged in filling orders received from all parts of the United States and foreign countries through the mail. None of these mail order establishments is situated in Louisiana. The Company has also 19 order offices, consisting of display room where no stocks are carried but catalogues and samples are displayed and orders taken for forwarding to the mail order establishments for acceptance and direct shipment to the customer. None of these mail order offices is located in Louisiana, but orders to be filled by mail are taken at the 5 retail stores in Louisiana. The Company operates 489 retail stores, which are of different character and comprise:

(a) 17 department stores designated as Class "A" stores carrying a complete line of general merchandise. None of these stores is located in Louisiana. In the fiscal year ending January 31, 1935, these stores had average sales of $1,271,118 per store.

(b) 456 retail stores of limited size carrying a limited line of merchandise, designated as Class "B" stores, located in 45 states, which during the fiscal year ending January 31, 1935, had average sales of $251,287 per store. 5 of these stores are located in the State of Louisiana and had average sales in 1934 of $184,803. No one of these five stores operated at a profit, and the average net loss per store for these 5 stores was $12,935. In the adjoining state of Arkansas in 1934, the Company operated 5 Class "B" stores, which had average sales of $166,646 and showed an average loss of $2,818 per store.

(c) 16 small stores devoted exclusively to the sale

of hardware, household appliances, automobile tires and tubes, respectively located in 10 states, all designated as Class "C" stores. Said stores during the fiscal year ending January 31, 1935 had average sales of $77,664 per store. None of these stores is located in the State of Louisiana.

The following is a summary in tabular form of the foregoing statement showing the wide differences in the character and extent of operations of Class A, Class B and Class C stores:

Type of Store	*Average Annual Sales*
Class A stores	$1,271,118.00
Class B stores	251,287.00
Class C stores	77,664.00

The differences in the character and extent of operations are even greater with respect to mail order establishments. In Louisiana the Company has only 5 Class B stores whose average sales in 1934 were $184,803.00.

The 5 Louisiana stores are operated as branches of and agents for the mail order establishment operated by the Company at Ft. Worth, Texas. Mail order catalogues are displayed at such stores, and the orders of customers are taken and transmitted to the mail order establishment, which ships the merchandise direct to the customer. During the fiscal year ending January 31, 1935, total mail orders received by and transmitted from the Louisiana stores to Ft. Worth aggregated $35,233.52. The Louisiana stores also act as agents for the Ft. Worth mail order establishment in accepting orders for merchandise not carried in stock, which are filled by shipment direct to the customer either from the mail order establishment in Ft. Worth or from the factory making such merchandise located outside the State of Louisiana. The amount of such shipments during the fiscal year ending January 31, 1935 was estimated at

about 4% of the total sales of the Louisiana retail stores. The aforesaid factory or stock orders and transferred catalog orders constitute transactions in interstate commerce and constitute about 9% of the total business done by the Louisiana stores.

Sears, Roebuck & Co., (R. 154-164), a New York corporation, at the close of its fiscal year on January 29, 1935, operated 436 establishments of all sorts, subdivided as follows:

Mail Order	10
"A" Stores	69
"B 1-a" Stores	18
"B 1 Stores	53
"B 2 Stores	178
"B 3 Stores	46
"C" Stores	54
Submail Order Offices	2
Agencies	6
Total	436

The mail order stores carry almost every conceivable form of merchandise. "A" stores carry a full line of merchandise customarily found in large department stores. The "B" stores each carry certain particular lines of merchandise, each group carrying a particular line which is different from the line carried by the other group. "C" stores carry only sporting goods, hardware, kitchen utensils, electrical goods, automobile accessories, paints and oils, radios and tires and tubes. Sub-mail order offices carry no merchandise but merely take orders to be shipped by the mail order offices. Agencies carry hard line merchandise and work on a consignment basis.

As shown by the foregoing statement, the 436 estab-

lishments (which are all treated alike under the Louisiana statute) vary widely in character, and this is further illustrated by the following statement of the average sales and profits of the stores during the fiscal year ending January 29, 1935:

	Number of Units	Average Sales Per Store	Average Profit Per Store	Percent of Profit to Sales
Mail Order Stores	10	11,887,080	859,700	7.23
"A" Stores	69	1,614,334	77,290	4.79
"B" Stores	295	262,409	15,526	5.92
"C" Stores	54	76,123	6,148	8.08

In Louisiana the Company operated during the fiscal year ended January 29, 1935, 4 stores, of which 2 were "A" stores, 1 was a "B 1" store and one a "B 2" store, as follows:

Location	Type of Store	Sales in Year Ending 1-29-35
New Orleans, one "A" Store		$ 2,667,588
Shreveport, one "A" Store		931,369
Baton Rouge, one "B 1" Store		68,691
Alexandria, one "B 2" Store		167,419

In the four years from 1930 to 1935 inclusive, the Alexandria store showed losses in 1932 and 1933 and profits in 1934 and 1935. The Baton Rouge store, which was in operation only in 1935, showed a loss, and the New Orleans and Shreveport stores showed large losses in every year. The results of operations in Louisiana are relatively much worse than the results of operations in other states. The operation of the company as a whole showed a profit during the fiscal year ending January 29, 1935 in every state in which the company operated except Louisiana, Mississippi, North Dakota and Oklahoma. The maximum percentage and profit to sales was in the District of Columbia, where it was

12.86%. In Louisiana the Company lost .091% of sales. The average percentage of profit to sales all over the country was 3.69%. There was a wide difference in the operations from state to state depending on the class of units operated in each state and the conditions in each state. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. Conditions are less favorable to profitable merchandising operations in Louisiana, which is predominantly rural in character and a large portion of the population of which is negro.

F. W. Woolworth Company, (R. 170-177), a New York corporation, sells general merchandise at retail prices ranging up to 20c per article. On January 1, 1935, it operated a total of 2,634 stores, of which 1,811 were located in 48 states in the United States, 37 were situated in Canada, 8 in Cuba, 81 in Germany and 597 in Great Britain. 14 of these stores were situated in Louisiana. A tabulation for the years 1930 to 1935 showed the following comparison of earnings of sales in Louisiana and earnings of the entire system (excluding only income from British and German subsidiaries):

	1930	1931	1932	1933	1934
Entire System	8.73%	7.74%	6.56%	8.14%	6.5%
Louisiana	4.57%	3.13%	0.83%*	2.78%	3.77%

*This was a loss.

In the year 1934 the Louisiana net income per store was about half the average net income per store of the stores in the St. Louis District, which comprises 189 stores in 11 different states, including Louisiana. This is due to the more unfavorable conditions of operation in Louisiana. Conditions of operation in Louisiana are not at all affected by operations outside the state, and obviously

not by operations in foreign countries. Under the Louisiana statute, the F. W. Woolworth Company pays $550 per store on each of its 14 stores in Louisiana, while Morgan & Lindsey operating 28 stores in Louisiana, pays $20 per store.

H. L. Green Company, Inc., (R. 112-119), is a New York corporation which retails articles of merchandise at prices not exceeding $1.00. It operates a total of 127 stores in 33 states and the District of Columbia. It has only one store in Louisiana. The average profit per store for the entire system for the year ending January 31, 1935 was $12,291, while the profit of the Louisiana store was $8,615. The gross profit of the Louisiana store was approximately 3½% less than average. The poor showing in the Louisiana store was due in part to the heavy freight charges for shipment to Louisiana because of the distance from the markets. The actual freight cost is 3.93% of sales while the average freight cost for the entire system is only 1.99% of sales, or about one-half the Louisiana cost. Another reason for the poor showing in Louisiana is that the cafeteria of the Louisiana store operates on about a 35% profit as compared with approximately a 50% profit for the entire chain. This difference is presumably due to local competition and merely indicates the wide difference in conditions from state to state.

H. L. Green Company is in competition in Louisiana with Morgan & Lindsey, a Texas corporation, which is in exactly the same kind of business and operates a total of 45 stores in Louisiana, Mississippi, Alabama and Texas, of which 28 are in Louisiana. The financial statement of Morgan & Lindsey shows total assets exceeding three-quarters of a million dollars. Under the Louisiana statute Morgan & Lindsey pays $20 per store, while H. L. Green

Company, Inc. for its one store would pay $100. Morgan & Lindsey has the benefit of operating in a more limited area under closer supervision and in closer contact with local taste and conditions.

W. T. Grant Company, (R. 102-112), is a Massachusetts corporation, which operates a total of 465 limited price department stores, of which 5 are in Louisiana and 460 are situated in 37 other states. In percentage of earnings to sales, Louisiana stores did better than the average of the total stores in the years ending January 31, 1931 and January 31, 1932, and worse in the years ending January 31, 1933, January 31, 1934 and January 31, 1935. In percentage of earnings to investments, Louisiana stores did better than the average of the total stores in the years ending January 31, 1931, January 31, 1932 and January 31, 1934 and worse in the years ending January 31, 1933 and January 31, 1935. In earnings per store Louisiana stores showed a worse result than the average of all stores in the years ending January 31, 1933 and January 31, 1935 and a better showing in the other years. Detailed comparisons over 5 years past are shown in the record. For the fiscal year ending January 31, 1935 the percentage of earnings to sales for the entire system was 2.970, while in Louisiana the percentage was 1.590. In that year the total earnings of the system comprising 465 stores were $2,526,686, or an average of $5,434 per store while in Louisiana the earnings of five stores were $19,809, or an average of $3,962 per store.

G. R. Kinney, Inc., (R. 119-125), a New York corporation, sells shoes at retail. On January 1, 1935 it operated 330 stores in 37 states, of which 3 stores are situated in Louisiana. The earnings of the Louisiana stores as units for the years 1930 to 1934 inclusive have been greatly less than the average earnings of all stores, and returns

on values invested in Louisiana have been greatly less than the return on the Company's entire investment. The record contains a unit comparison by stores over a 10-year period.

J. J. Newberry Co., (R. 143-145), a Delaware corporation engaged in the operation of 5-10-25c stores of the variety type, in 1934 had 330 stores, none of which were located in Louisiana and the corporation was not engaged in doing business in Louisiana. The corporation has three subsidiary corporations, incorporated in Virginia, California and Texas respectively. Neither the Virginia company nor the California company has any stores in Louisiana. The Texas corporation, which operates a total of 15 stores, had in 1934 2 stores in Louisiana (now only 1). The Texas corporation began doing business in Louisiana only in 1933 and the first complete year of operation was 1934. In that year the two Louisiana stores made $2,788.62, or about $1,394 each, while the 431 total stores operated by all the Newberry corporations made $2,845,-199.71, or an average of $6,601 per store. The percentage of net earnings to sales for the corporation and the subsidiaries is something under 7%, while in Louisiana the percentage was less than 1½%.

J. C. Penney Company, (R. 145-149), a Delaware corporation, engaged in the business of selling general merchandise at retail, operated on January 1, 1935, 1474 stores in 48 states, of which 8 were located in Louisiana. A comparison of net earnings for the entire system with earnings of Louisiana for 5 years, indicates the percentage of earnings to sales in Louisiana to be less than the percentage of earnings to sales for the entire company in each year. Louisiana units are not comparable with units operated in other sections of the country and other states. The variations from section to section are illustrated by

a statement in the record comparing the results of the Company in 9 districts over 5 years. This statement shows that the percentage of net earnings to gross revenues varies from 8.426% down to 6.7416%. Possible variations in results between two different states is indicated by the fact that in North Dakota the percentage of profit to gross revenues was 9.08%, while in New Jersey it was 3.72%. Stores in any given state may show better or worse results than average and differ widely from stores in other particular states, which is due to disparity in wealth, population, purchasing power and the like.

The Scott-Burr Stores Corporation, (R. 150-153), a Delaware corporation, operates 5c to $1 retail variety stores. As of January 1, 1935, it owned and operated 135 stores in 26 states, 3 stores being situated in Louisiana. In the year 1934 all stores operated by the corporation made a profit of $59,752, while each Louisiana store operated at a loss, the New Orleans store losing $915, the Baton Rouge store losing $7,053 and the Alexandria store losing $2,858. In 1933 the present corporation was not in existence, but Scott Stores, Inc., a predecessor company, suffered a loss in that year on the 3 Louisiana stores of $12,000, as compared with a total loss of $15,000 on all its operations. Operations in Louisiana are more difficult and less profitable than average operations outside Louisiana.

Wohl Shoe Company, (R. 164-170), a Missouri corporation, operates leased shoe departments in department stores owned and operated by others. These departments are operated in the names and under the supervision of the owners, as in the case of Consolidated Millinery Company. The Company operates a total of 209 such departments and 23 stores, which are located in 37 states and the District of Columbia. 6 of the departments are located in the State of Louisiana. In the years 1932 and 1933,

the Company's operations in Louisiana were conducted at a loss. In 1934 they showed a profit of 1.72%. The entire system showed a profit in each of the three years ranging from 4.96% in 1932 to 4.81% in 1933 and 4.90% in 1934. The record contains an itemized statement of the operations of the entire company in 1933 and 1934 in each of the states in which it operated in those years. This statement illustrates the extremely wide variations in results from state to state.

Consolidated Millinery Company, (R. 98-101), an Illinois corporation, also operates what is known as leased departments in stores belonging to others in 43 states and the District of Columbia. Of these 5 are situated in Louisiana. Operating results in Louisiana are inferior to the average operating results all over the country and in immediately adjoining states. The Company's income tax returns show an average earning for Louisiana stores amounting to $1,161.78 and an average per store for the entire system amounting to $1,232.42, but from store to store and section to section earnings vary widely. In the millinery business local taste, conditions and contacts are specially important.

Federal Trade Commission Reports Negative Any Finding That Increase In Size Gives Advantage to Larger Chains

The annual report of the Federal Trade Commission for the fiscal year ending June 30, 1935 contains at page 32 and following a summary of the Commission's chain store investigation. At page 39 of the report the following statement is made as to the absence of any evidence to support a finding that increase in size gives any advantage to larger chains.

"**Prices and operating results of large and small chains.**—Based on an analysis of the gross profits on retail sales and average net retail sales per store for the years 1921-30, both separately and combined, **there is little evidence of any close general relationship between the size of the chain and either the average sales per store or the size of the spread** between the cost of merchandise to the chain and the selling price to the consumer, commonly known as the 'gross margin.'

"**A somewhat similar result to the foregoing is shown by the gross margin and operating expense percentages** on sales for various kinds of chains consolidated for 8 years according to the number of stores operated. These figures are subject to the qualification of including the entire operating results of the chains, thus taking into account wholesaling and manufacturing operations in addition to retail selling.

"In the case of operating expenses, chains in 11 kinds of business show only indeterminate results, according to the number of stores operated, those in the remaining lines being about evenly divided between chains showing a tendency for operating expenses to increase and those showing a tendency for operating expenses to decrease with the size of the chain.

This summary is supported by the itemized figures which appear in the detailed reports made by the Federal Trade Commission to Congress. See Report on Sales, Costs and Profits of Retail Chains, Senate Document No. 40, 73rd Congress, First Session, table 32 at page 55, which appears in an appendix. As appears from this table, chains between 100 and 500 units show a greater net operating profit (5.65%) than chains which operated over 1,000 units (4.23%) Chains operating 2 to 5 stores had a greater percentage (4.86%) of net operating profit

to sales than did chains operating over 500 units (4.39%) and a considerably greater percentage than did stores operating over 1,000 units (4.23%).

See also the Report on Gross Profit and Average Sales Per Store of Retail Chains, Senate Document No. 178, 72nd Congress, 2d Session, table 16, which likewise appears in the appendix. In its comment on this table, at page 33, the Federal Trade Commission says:

> "This table would seem to indicate that there is a very decided and definite tendency for both average sales per store and gross profits of chain stores as a whole to **decline as the size of the chain increases.** Except in the 101 to 500 group, there is a regular and marked decline in average sales per store as the size of the chain increases. Except for the 6 to 10 store chains, there is also a similar marked and regular decline in the percentage of gross profit to sales. This apparent tendency also appears in the figures of 1921-1930 as is shown by the following table covering those years. The detailed totals upon which this table is based will be found in Appendix Table 5."

Evidence for Defendants

The defendants' testimony consisted chiefly of the affidavits of various merchants residing in Louisiana, some of whom were operators of local chains and others of whom were wholesalers, reciting the **opinion** of the affiants as to the advantages enjoyed by chains. These affidavits (R. 190-255) are largely repetitious. They contain no competent factual testimony. They reiterate merely the unsupported opinion of the affiant to the general effect that "the greater the amount of purchases of a chain, the greater the buying power and the greater the advantage afforded the operator * * * * *; the greater

the number of units in the chain or system, the greater the buying power and the greater the opportunity for distribution at lower cost, the lower the cost of distribution, the lower the cost of advertising, and the greater the many other advantages accruing to such operators,"' also general expressions of opinion that chains undersell local independents and are gradually eliminating independents as well as wholesale merchants (R. 190-209). Expressions of opinion were carried to the point of having two members of the Louisiana Legislature who voted for the challenged statute, recite their motives for procuring the passage of the law. Thus, one legislator (R. 251) recited in his affidavit that he became "co-sponsor" of the challenged statute because he had become convinced that the ordinary chain store tax statute such as the Louisiana Act of 1932 "was not accomplishing the results desired" in that it failed to reach "in a just proportion" the chain stores operating in Louisiana that had the greatest purchasing power.

> "by virtue of the great number of stores *operated outside the State of Louisiana* and because of the enormous volume of business done *beyond the confines of this State.*" (Italics ours).

The affidavit of another legislator recites (R. 254) that the national chains "with their enormous purchasing power and other advantages accruing by virtue of their operating in multiple units" are forcing independents out of business and that the Legislature and himself individually

> "believed and were of the opinion that the State of Louisiana, in its sovereign capacity, should encourage individual initiative among its citizenship, and individually owned, in preference to chain

ownership, for the reason that a person makes a better citizen when he owns his own business establishment and is not a mere employee at a meagre wage of some gigantic corporation whose officials he does not know and whose officials do not recognize his needs and wants and the employees accept work with the organization solely and only because, by reason of the size of the organization, he is unable to operate as an independent retailer and own his own establishment."

Mr. William E. Penick, Vice-President and executive head of H. G. Hill Stores, Inc., made an affidavit reciting in general terms that The Great Atlantic & Pacific Tea Company enjoys great advantages over the Hill Stores in purchasing power, spreading its operation over a wide area, and use of national radio advertising (R. 219-225). In this affidavit reference was made to the testimony given by representatives of The Great Atlantic & Pacific Tea Company before the Special Committee appointed by the House of Representatives to investigate the American Retail Federation, according to which Atlantic & Pacific received in 1934 special discounts, allowances and brokerages amounting in round figures to $8,105,000.

Upon the filing of Mr. Penick's affidavit, a rebuttal affidavit was filed by Mr. David P. Bofinger, Vice-President of The Great Atlantic & Pacific Tea Company (R. 96), reciting that H. G. Hill Stores had invested capital of approximately $1,000,000, operated 87 stores in New Orleans and had reported in 1933 sales of not less than $4,000,000, and that their operations were so extensive that they were in a position to receive allowances and discounts as great as those received by the A. & P. on the great bulk of their purchases, if not on all of them, the detailed facts of these allowances being specially within the knowledge of operators of Hill Stores. In reply to

this affidavit there was filed a further affidavit by Mr. Penick (R. 225), reciting that this statement of Mr. Bofinger was erroneous and untrue, and that the allowances received by the A. & P. were many times greater than those received by Hill Stores. **Mr. Penick, however, did not state the amount of allowances actually received by Hill Stores** and was apparently unwilling to give information corresponding to that supplied by A. & P. officials.

Mr. Penick's affidavit and the testimony therein quoted related only to discounts and allowances to The Great Atlantic & Pacific Tea Company. The court below made a specific finding in the case of Liggett Drug Company (see paragraph XIV of the findings, R-267) to the effect that in the drug trade quantity discounts do not become any greater after a certain point is reached.

The general statements made in the defendants' affidavits as to growth of chains at the expense of independents are refuted by official figures of the Bureau of the Census, which are referred to at R. 182-3. In the United States as a whole between 1929 and 1933 the total number of retail stores declined 1.1%, while the number of retailers (proprietors actively engaged in their stores but not on payrolls) increased 4.2%.[1] The following table shows that the number of chain stores in Louisiana decreased between 1929 and 1933 more than the number of independents.[2]

	1929	*1933*	*Percentage of Change*
Independents	20,994	20,014	—4.67%
Chains	1,224	1,144	—6.54%

[1]Census of American Business Retail Distribution: 1933, by Areas, page 3.

[2]Census of Retail Distribution for Louisiana, R-129 (1929) page 20; Census of American Business, Chains and Independents (1933) page 37.

The total number of wholesalers of all kinds in Louisiana, including agents, brokers, manufacturers and sales branches, etc., increased from 1,729 in 1929 to 2,097 in 1933, an increase of 21.2%.[3] The number of "wholesalers proper" in Louisiana, under which are included wholesale groceries, wholesale drugs, wholesale hardware and other lines, increased during the same period from 882 to 1,109, an increase of 24.6%.[4]

The court below recognized the conclusive force of the census figures by including in its findings of fact in paragraph V the following (R. 265):

> "The number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and the number of wholesale stores in Louisiana is actually increasing."[5]

The court below however also adopted in paragraph VI of its findings the general statements made in the affidavits of the witnesses for the defendants to the effect that,

> "The greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the ad-

---

[3]Census of American Business Wholesale Distribution: 1933, Vol. VI, page 30.

[4]Ibid, page 139

[5]The 1935 Census figures, which have become available since the record below was prepared and of which the court may take judicial notice, show the number of chain stores in Louisiana to be 1,052 and the number of independents 21,569. This shows that the number of chain stores further decreased between 1933 and 1935, but the number of independents actually increased. See Census of Business, 1935, Retail Distribution, Vol. 4, page 81.

vantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead." (R. 265).

And in paragraph VIII the court made a finding that

"In fine, the record in this case shows the contribution to the advantages made by each unit in the chain and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the Jackson case." (R. 266).

These findings, which were duly objected and excepted to (R. 271), have no support in this record other than the unconfirmed expressions of opinion contained in the affidavits of the witnesses for the defendants. It is true that the Congressional Committee which investigated the American Retail Federation found that large discounts and advertising allowances had been made to The Great Atlantic & Pacific Tea Company. There was, however, no showing that these allowances resulted from the number of units in the chain, or that The Great Atlantic & Pacific Tea Company would not have received the same allowances if it had had a very much smaller number of units in its chain. The finding that the greater the number of units in the chain, the greater the advantages to the chain is directly negatived by the report of the Federal Trade Commission in Senate Document No. 40, 73rd Congress, 1st Session, and Senate Document No. 178, 72d Congress, 2d Session, to which reference is made *supra*, pages 27, 28. The court below itself made a specific finding that in the drug trade quantity discounts do not become any greater after a certain point is reached (R. 267).

General Findings of Fact Bearing Upon the Operations of Complainant and Intervenors

The court below conceded the conclusive character of the testimony as to the wide variation between operations of chains in Louisiana and operations outside the State, and the relatively unprofitable character of operations in Louisiana, by including in its findings of fact as paragraph IX the following (R. 266):

> "Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company."

Detailed Findings of Fact Comparing Operations of Complainant and Intervenors with Local Chains

The court below also conceded the conclusive character of the evidence that certain local chains did far more business in Louisiana than complainant and comparable intervenors, yet were taxed at far smaller rates under the challenged statute. See e. g. paragraphs IV, X and XIV of the findings (R. 264, 266, 267):

> "The operations of the complainant, The Great Atlantic & Pacific Tea Company, in the City of New Orleans are the same in general character as those of H. G. Hill Stores, Inc., a Louisiana corporation, which operates 87 stores in New Orleans. Both the complainant and H. G. Hill Stores, Inc. operate a

chain of grocery and meat stores carrying about the same lines of merchandise, and their merchandising methods, leader items and selling prices are practically the same. The gross volume of sales of the Hill Stores in New Orleans is very much greater, they have more stores and do more business per store than does the complainant. The total purchasing power of the complainant, The Great Atlantic & Pacific Tea Company is much greater than that of H. G. Hill Stores, Inc. The complainant has field offices located at primary markets, which are in charge of specialists and supervised by central purchasing offices in New York, and maintains divisional warehouses throughout the country. The operations of the Hill Stores are confined to Louisiana and chiefly to New Orleans. Under the Louisiana statute, the Hill Stores pay a tax of $30 per store."

"H. L. Green Company, Inc., a New York corporation, retails articles of merchandise at prices not exceeding $1. It operates a total of 127 stores in 33 states and the District of Columbia. It has one store in Louisiana. It is in competition in Louisiana with Morgan & Lindsey, a Texas corporation, which operates a total of 45 stores in Louisiana, Mississippi and Alabama, of which 28 are in Louisiana. Under the Louisiana statute H. L. Green Company, Inc. pay a tax of $100 on one store while Morgan & Lindsey pay $20 per store."

"Liggett Drug Company, a Delaware corporation, operates 452 stores situated in 32 states and the District of Columbia, of which 6 stores are located in Louisiana. In New Orleans the Liggett Stores are in competition with 3 local chains and in Shreveport with 1 local chain. One of the local chains, Katz & Besthoff, Ltd. operates 10 stores in the State of Louisiana, all of which are in New Orleans. Katz & Besthoff's general methods of doing business are the same as those of Liggett, but

the gross volume of the sales of Katz & Besthoff stores is very much greater, they have more business and do more business per store than the stores of Liggett. In the drug trade quantity discounts do not become any greater after a certain point is reached. Under the Louisiana statute the Liggett tax is $500 per store while the Katz & Besthoff tax is $10 per store."

SUMMARY OF ARGUMENT

(1) The Louisiana statute taxes operations outside the State.

(2) The Fourteenth Amendment precludes the State from imposing such a tax. A state cannot by language or indirection accomplish an unconstitutional purpose. The right of Louisiana to exclude a foreign corporation cannot be used as a basis for taxing it upon property or operations that by established principles the State has no power to tax.

(3) The Louisiana statute cannot be supported on the theory that Louisiana taxes only what is in Louisiana by analogy to allocation cases. Allocation cases do not involve any question of **rate** of taxation. They deal only with the problem of determining what is within the State. They afford no support to an attempt to increase the **rate** on what is within the State by reference to what is outside.

The allocation cases deny any right to a State to tax outside operations. An allocation formula is valid only where it fairly determines what is within the State. Such a formula cannot be based solely upon units where such units differ greatly in character and size from state to state and foreign country. The Louisiana statute gives the same effect to the existence of all establishments

under the same ownership wherever situated without regard to character, location or bearing upon Louisiana business. The Louisiana statute does not undertake any classification of chains into national, sectional and local. It gives no weight whatsoever to geographical location.

Under an allocation formula a State's power to tax would never increase while operations within the State decreased, **but this is the effect of the Louisiana statute.** The Louisiana statute is designed, not to determine by proper allocation what is within Louisiana, but to bring into Louisiana what is not there, or to change the rate of tax on what is within Louisiana because of what is elsewhere.

(4) Because of its extra-territorial operation, the Louisiana statute denies the equal protection of the laws to chains doing business in Louisiana by arbitrarily discriminating between them. The statute was not designed to protect, and does not protect, independents against chains, but discriminates in favor of certain chains against others.

(5) If the Louisiana chain store statute is valid, its principle is equally applicable to income, franchise and sales taxes. If the rate of such taxes applicable to operations within the State can be increased by reference to factors outside the State, the State may by such increase exclude operations or individuals operating outside the State. This would convert the Union into a Confederation of States. Prohibition of size extending to operations outside the state may properly be accomplished only by national legislation.

ARGUMENT

(1) The Louisiana Statute Taxes Operations Outside the State.

Under the Louisiana statute a corporation, firm or individual operating 1 establishment in Louisiana and no establishment elsewhere, pays no tax in Louisiana. If the corporation, firm or individual then acquires an establishment in New York, the acquisition of that establishment subjects the owner to a tax in Louisiana upon the Louisiana establishment.

If a company operates 10 establishments in Louisiana and none elsewhere, it is required to pay Louisiana a tax of $10 per establishment, or $100. If it acquires an additional establishment anywhere in the world outside of Louisiana, the rate of taxation upon the 10 establishments in Louisiana then becomes $15 per establishment, or $150, or an increase of 50% in tax upon the Louisiana establishments solely as a result of the acquisition of one establishment outside Louisiana. If a company operating 125 establishments throughout the world, of which 1 is situated in Louisiana, then acquires 1 additional establishment anywhere in the world, the Louisiana tax on the 1 establishment in Louisiana is increased 100%, being increased from $50 to $100 by virtue solely of the fact that the company has acquired an additional establishment outside of Louisiana.

Thus, a company or individual operating in Louisiana would be penalized by Louisiana by the imposition of additional Louisiana taxes if that company or individual undertakes to open even 1 additional establishment outside Louisiana. The necessary effect is that Louisiana regulates operations outside Louisiana and may deter or in effect prevent such operations. If the principle of the Louisiana

tax is sound, there is no limit as to the amount of tax which Louisiana might claim as a result of what is done outside Louisiana.

The intervenor, Wohl Shoe Company, for example, operates 232 shoe departments, of which 6 are in Louisiana. Its 6 Louisiana departments fall into bracket 11 of the Louisiana statute and are subject to a tax of $300 each. If Wohl Shoe Company operated only 225 departments outsideLouisiana and still 6 in Louisiana, it would fall into bracket 10 and pay a Louisiana tax of $250 per department, or $50 less per department. Louisiana has thus increased the tax upon Wohl Shoe Company because of its operation of additional departments outside Louisiana.

Under the Louisiana statute the tax claimed by Louisiana may be increased although operations in Louisiana actually decrease. If a company operates 100 stores, of which 2 are located in Louisiana, it will be required to pay to Louisiana under the challenged statute $30 per store, or $60. If the company finds its operations in Louisiana unprofitable and discontinues 1 of its Louisiana stores but expands its operations in other sections of the country, no matter how remote, so that it operates a total of 126 stores anywhere in the world, it will then be required to pay Louisiana $100 upon the 1 store that is left in Louisiana, although it was previously paying only $60 for the operation of 2 stores in Louisiana. **Thus, it is burdened with additional taxes in Louisiana, although it has decreased its operations in Louisiana.**

The table printed at page 9, *supra*, shows that Companies B which operates 5 stores in Louisiana is required to pay to Louisiana under the challenged statute taxes aggregating $1,250, while Company C, having precisely the same number of stores in Louisiana, is re-

quired to pay $2,500, or twice as much. Company E, having 3 stores in Louisiana, pays $1,350, while Company J, also having 3 stores in Louisiana, pays only $300, or only one-fourth as much as Company E. Company F, having 6 stores in Louisiana, is required to pay $3,000, while Company L, having an equal number of stores in Louisiana, is required to pay only $1,800. These examples show differences in taxes payable in Louisiana, ranging from 100% to 400%, resulting solely from operations outside Louisiana.

The member of the Louisiana Legislature who testified as a witness for the defendants in effect admitted that the 1934 Louisiana statute was **in fact designed** to tax what is **outside** Louisiana. We refer to the affidavit of Representative Burns (R. 251), who stated that the prior Louisiana statute (which calculated the tax only upon stores within the State) failed to reach in a just proportion

> "the chain stores operating in Louisiana that had the greatest purchasing power **by virtue of** the great number of stores operated **outside** of the State of Louisiana, and because of the enormous volume of business done **beyond the confines of this State.** That **as a result** of this thought and study * * * * Act 51 of 1934 was prepared with the view in mind that chain stores should be taxed on the basis of the number of units in the national chain, and not solely on the number of units operating in the State of Louisiana, * * * * *"

If the Louisiana law is upheld and every state passes a similar law, then before any one operating a mercantile establishment in one state could open an additional establishment anywhere in the world, he or it would have to consider the effect of opening that establishment upon

taxes in every other state. The result of opening an additional establishment in one state would be to increase the taxes which the owner would have to pay upon existing establishments in every other state. Thus, **the tax cost of opening an additional establishment in any one state would depend not upon the law of that state but upon the law of 47 other states.** If the effect of opening an additional establishment in State A (without any increase in the operations in other states), is to increase the taxes in all other states or even in a number of such other states the result will be to deter the opening of the additional establishment in State A. This further illustrates how a statute like the Louisiana statute reaches out beyond the state and operates to control what is done in other states.

(2) The Fourteenth Amendment Precludes the State from Imposing a Tax on Operations Outside the State.

This Court has repeatedly declared that a state statute taxing operations outside the state is invalid as the taking of property without due process of law and in violation of the 14th Amendment of the Constitution of the United States.

In *Safety Deposit Trust Company vs. Virginia*, 280 U. S. 83 (1929), the Court said (page 92)*:

> **"A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment.** *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204; *Buck v. Beach*, 206 U. S. 392, 402, 408, 409; *Frick vs. Pennsylvania*, 268 U. S. 473; *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 575."

*Black lettering or bold face type throughout this brief is ours unless otherwise specifically indicated.

In *Provident Savings Association vs. Kentucky*, 239 U. S. 103 (1915), the Court said at page 112:

> **"Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment** (*Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R. v. Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 209); **and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control."**

In *Louisville etc. Ferry Company vs. Kentucky*, 188 U. S. 385 (1903) the tax involved was a franchise tax assessed against a Kentucky corporation. It was contended that Kentucky had a right to include in its assessment the value of a franchise from the State of Indiana conferring the privilege of maintaining a ferry across the Ohio River from the Indiana shore to the Kentucky shore. The Court in denying the right of Kentucky to maintain the tax, said at pages 395, 396:

> "As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it **directly or indirectly?** It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. **This view sacrifices substance to form.** If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Ken-

tucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.

"The learned counsel for Kentucky says that it is the value of the company's franchise contained 'in its charter' which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter granted by Kentucky. It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana.

"Counsel further say that Kentucky does not impose a tax upon the company's privilege, *as such*, granted by the State of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the Board of Valuation and Assessment proceeded, **Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises.** Although now owned by one corporation, these are separate franchises."

In the case cited it was argued that the franchise to operate a ferry to the Kentucky shore was more valuable in Kentucky because of the existence of a similar franchise in Indiana, without which the ferry could not have been operated between the two shores. This argument corresponds to the argument in the present case that Louisiana has the right to tax complainant and in-

tervenors upon what they do and have elsewhere because what they have and the operations they conduct elsewhere make their Louisiana operations more valuable. Adopting the language used by the court in the case cited, such an argument sacrifices substance to form. If Louisiana had undertaken to directly impose a tax upon the privilege of doing business elsewhere, the tax could not be defended as valid, yet Louisiana seeks to accomplish that result by basing its tax upon the privilege granted by other states.

In *Delaware, L. etc. Railroad Company vs. Pennsylvania*, 198 U. S. 341 (1905), under the authority of a Pennsylvania statute, there had been levied upon a Pennsylvania corporation a tax upon its capital stock. The corporation contended that in fixing this tax it had a right to deduct the value of coal belonging to the corporation situated outside the State. The court upheld this contention, saying (page 356):

> "We regard this tax as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it. * * *
>
> "So, if the State cannot tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.
>
> "We think the state court is right in deducting, as it does, the value of the tangible property, when permanently held in another State, and we think that for the same reason the same rule should obtain in the case of tangible property situated, as this coal was. We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo*

nomine, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? **If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power** by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

At the conclusion of its opinion, the court referred to *Louisville, etc. Ferry Company vs. Kentucky, supra*, and said (page 360):

"It is plain that in the case at bar the coal had lost its *situs* in Pennsylvania by being transported from that State to foreign States for the purposes of sale, with no intention that it should ever return to its State of origin. It was, therefore, as much outside the jurisdiction of the State of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, **which value was increased by the value of the franchise created by Indiana.** Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amend-

ment, which prevents the taking of its property in that way."

The cases immediately above cited were followed by *Union Transit Company vs. Kentucky*, 199 U. S. 194 (1905), commonly cited as the leading authority against the power of a state to tax property beyond its borders. It was there held that a corporation organized under the laws of Kentucky was not subject to taxation upon tangible personal property (freight cars) situated outside the State of Kentucky, and that such taxation would be a violation of the 14th Amendment. The court laid down the rule in general terms (page 204):

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

In *New York Life Insurance Company vs. Head*, 234 U. S. 149 (1914), it was held that a Missouri statute regulating loans on policies of life insurance could not operate to affect a contract made in another state by the insured and the company, the head-note reading:

> "A State may not extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as to destroy and impair the right of persons not its citizens to make a contract not operative within its jurisdiction and lawful in the State where made."

At page 162, the court said, citing the earlier cases above noted:

> "It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer v. Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that **a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction** either by way of the wrongful exertion of judicial power or **the unwarranted exercise of the taxing power.**"

And at page 163, after referring to the contention of counsel, the court said:

> "But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that **because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States.** It is apparent therefore that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States **to exact as a condition of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing.** It would go further than this, since it would require it to be

> decided not only that the constitutional limitations on state powers could be set aside as the result of a license but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority".

So in this case to maintain the power asserted by Louisiana would be to give Louisiana the right in effect to regulate business outside its borders and the right to control the domestic concerns of other states. **It would give Louisiana the power to exact as a condition of a license granted to plaintiff and intervenors to do business within its borders "that the Constitution shall be inapplicable and its limitations worth nothing".** If the Louisiana statute is upheld, then the operations of the parties in this case outside Louisiana are in effect controlled by Louisiana. If the theory of the Louisiana statute is sound, it may be extended. A corporation which has one store in Louisiana might be required to pay an additional $1,000 to Louisiana for opening a store in New York. This would in effect make the right to do business in other states dependent upon conditions imposed by the Louisiana law. It is no more answer to say that this is the result of the corporation doing business in Louisiana and thereby submitting itself to the Louisiana law than it was in the case cited to say that the act regulating loans on life insurance policies should be upheld because the foreign insurance company had undertaken to do business in Missouri. The statute there as here undertook to affect what might be done outside the state by a corporation doing business inside the state. The statute here must be held as bad under the 14th Amendment as the statute in the case cited.

A State Cannot by Language or Indirection Accomplish an Unconstitutional Purpose.

In *Fidelity and Deposit Company of Maryland vs. Tafoya*, 270 U. S. 426 (1926), a statute of New Mexico prohibited any insurance company from paying any non-resident of the state any fee or brokerage for writing any insurance policies covering risks in New Mexico. The statute was held invalid under the 14th Amendment, the court saying (pp. 434, 435):

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. **But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.** * * * *Frick v. Pennsylvania*, 268 U. S. 473. *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U. S. 350, 358. *Badders v. United States*, 240 U. S. 391, 394. *United States v. Reading Co.*, 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral v. Burke Construction Co.*, 257 U. S. 529; **or to tax it upon property that by established principles the State has no power to tax,** *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co., v. Cope*, 235 U. S. 107, 203; *Looney v. Crane Co.*, 245 U. S. 178, 188. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the

attempt. *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 153 U. S. 628, 646."

The Louisiana statute involved in the present case undertakes to do what this decision says cannot be done. Thus the Louisiana statute seeks to obtain additional revenues for Louisiana by taxing operations outside the State notwithstanding the fact that the privilege of conducting such operations is derived from the States within whose borders they are carried on, that such States themselves tax such operations, that Louisiana does not and cannot grant a license to do business beyond its borders, and that an extra-territorial tax is a clear violation of the 14th Amendment.

The principle that the form of the statute must yield to its substance and that **a State cannot by language or indirection accomplish an unconstitutional purpose,** is illustrated in *National Life Insurance Co. v. United States*, 277 U. S. 508, (1927). It there appeared that under the provisions of the Federal Revenue Act of 1921 the plaintiff insurance company was entitled to deduct from its gross income (1) interest on tax-exempt securities and (2) 4% of the Company's mean reserve funds diminished, however, by the amount of the first deduction comprising interest from tax-exempt securities. The plaintiff although allowed the first deduction comprising the interest from its exempt state, municipal and United States bonds was not advantaged thereby; for, since the same amount was subtracted in computing the second deduction, its tax was the same as if all of its securities had been taxable, and higher than it would have been if those that were tax-free had not belonged to it. This Court held that the effect of the statutory computation of deductions was to impose a direct tax on the income of the exempt securities, amounting to taxation of the securi-

ties themselves, and that the tax insofar as it affected state and municipal bonds was unconstitutional. The court said at page 519:

> "The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax exempt securities. Because of the receipt of interest from such securities, and to its full extent, pursuing the plan of the statute, the Collector diminished the 4% deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. **If permitted this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free.** No device or form of words can deprive him of the exemption for which he has lawfully contracted."

This decision was followed in *Missouri vs. Gehner*, 281 U. S. 313 (1930), where the statute after recognizing United States bonds as exempt from taxation, provided that debts should be applied against these exempt securities with the result that the owner was left subject to the same taxes as it would have had to pay if it had owned no exempt bonds. The court held that the State had no power to pass such a statute and struck down the attempt. This case was cited by the court with approval in *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 13 (1935).

The cases last cited afford another application of the principle stated by Justice Holmes in the *Fidelity & Deposit* case, *supra*, that **"a State may not use a so-called right as part of a scheme to accomplish a forbidden result"**. Yet that is precisely what the Louisiana statute

undertakes to do. In the case at bar, it would be conceded that Louisiana had no power directly to tax property and operations beyond its borders; but the effect of increasing the taxes upon operations within the borders of Louisiana solely because the owner conducts operations outside of Louisiana is tantamount to taxing the operations outside the state just as surely as in the cases cited the method employed amounted to taxing exempt property and income through the device of increasing taxes upon non-exempt items. The plaintiff and intervenors may not be subjected to greater burdens upon their operations in Louisiana solely because they conduct operations outside Louisiana which it is beyond the constitutional power of Louisiana to tax. Paraphrasing the language of the *National Life Insurance Co.* case, plaintiff and intervenors **"may not be subjected to greater burdens upon their taxable business in Louisiana solely because they conduct business outside Louisiana which is tax-free in Louisiana".**

In *Bethlehem Motors Corporation vs. Flynt*, 256 U. S. 421 (1921), the court set aside as discriminatory and in violation of the 14th Amendment, a North Carolina statute which imposed a license tax of $500 upon every automobile manufacturer making sales within the state, with a provision that the tax should be reduced to $100 for every manufacturer who showed that at least three-fourths of his entire assets were invested either in bonds of the United States or its municipalities, or in property situated within the state and returned for taxation there.

In *Colgate vs. Harvey*, 296 U. S. 404 (1935), the Court held invalid under the 14th Amendment a Vermont statute which exempted from taxation the net income from money loaned within the state at not more than 5% interest, saying:

" • • • The right of a citizen of the United

States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment. The imposition by one state of a discriminating tax upon a citizen resident in another state for trading in the territory of the former has been held invalid. *Ward v. Maryland*, 12 Wall. 418, 430. And, of course, conversely, a tax of that description is likewise void if imposed by one state upon a resident citizen of the United States for trading or doing business in the territory of another state. **And such a tax is not justified because the taxing state will thereby help its domestic business.** * * *

"And it well cannot be doubted that legislation of one state denying the privilege or taxing the transaction when it occurs in another state, while leaving the transaction wholly free from taxation when it takes place in the former state, would abridge that privilege of citizenship. **It would be no answer to say that thereby the former state was building up her local insurance companies and adding to the wealth of the state.**"

So in this case the tax imposed by **the Louisiana statute cannot be justified on the ground that Louisiana will thereby help its local independent merchants** (even if the record showed that such merchants would be helped, which, as we point out in another passage of this brief, it does not); **and it is no answer to the arguments upon the constitutionality of the statute to say that Louisiana is building up her local merchants and attempting thereby to add to the wealth or well-being of the State,** even if the legislation were in fact calculated to attain that end.

The rule laid down in the cases arising under the

14th Amendment finds its parallel in the tax cases arising under the commerce clause, of which perhaps the most recent instance is *Cooney vs. Mountain States Telephone & Telegraph Company*, 294 U. S. 384 (1935), where the court, through Chief Justice Hughes, said (p. 393):

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; **that the amount exacted is not increased because of the interstate business done.** * * * "

So where a tax is imposed upon property or operations within the state, it must appear that it is imposed solely on account of the presence of such operations or property **and the amount exacted cannot be increased because of the existence of operations or property outside the state.**

In the case at bar, Louisiana can tax establishments and business in Louisiana, but it cannot increase its exaction because of establishments and business outside Louisiana; yet that is precisely what the Louisiana statute undertakes to do because it increases the tax levied against plaintiff and intervenors enormously solely because of the establishments which they have and operate outside the state.

***Maxwell vs. Bugbee*, 250 U. S. 525 and *Frick vs. Pennsylvania*, 268 U. S. 473**

The defendants relied in the court below upon *Maxwell vs. Bugbee*, 250 U. S. 525 (1919). That was a 5 to 4 decision, in which the dissenting opinion was written by Mr. Justice Holmes. In that case New Jersey asserted the right to levy an inheritance tax on stock in a New Jersey corporation belonging to a non-resident decedent. This

right was asserted upon the authority of prior decisions of this Court, particularly *Blackstone vs. Miller*, 188 U. S. 189 (1903). The New Jersey statute provided that in the case of a non-resident decedent the tax should first be calculated upon the basis of the tax that would have been due if all of the non-resident's property had been within New Jersey, and that the estate of a non-resident decedent should then be required to pay to New Jersey such proportion of the tax so calculated as the value of the property in New Jersey bore to the total value of all property of the estate. By a majority of one, this Court maintained the validity of the New Jersey statute against the objection that it amounted to taxing property outside the State. **The case has never been followed.** Since its decision, this Court has reversed *Blackstone vs. Miller*, upon the general authority of which *Maxwell vs. Bugbee* was rested, and has held that the state where a corporation is domiciled is without power to levy any inheritance tax whatsoever upon the stock of such a corporation belonging to a non-resident decedent. Thus, New Jersey today could no longer assert any inheritance tax whatsoever in the circumstances presented by *Maxwell vs. Bugbee*, and that decision is in effect a dead letter. See *Farmers Loan & Trust Company vs. Minnesota*, 280 U. S. 204 (1930); *First National Bank vs. Maine*, 284 U. S. 312 (1932); *Baldwin vs. Missouri*, 281 U. S. 586 (1930); *Beidler vs. So. Carolina Tax Commission*, 282 U. S. 1 (1930).

In his dissenting opinion in *Maxwell vs. Bugbee*, Justice Holmes said (250 U. S. at 544):

> "It seems to me that **when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what**

> **form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."**

In *Frick vs. Pennsylvania*, 268 U. S. 473 (1923) the court declined to follow *Maxwell vs. Bugbee*. In that case Mr. Frick died, domiciled in Pennsylvnia, leaving a large estate, of which a considerable portion was taxable personalty situated in New York and Massachusetts. Under the Pennsylvania statute, in calculating the amount of tax to be levied on the property in Pennsylvania, the taxing officers took into consideration the value of the property in New York and Massachusetts. The State Court sustained the tax on the authority of *Maxwell vs. Bugbee*. *In Re Frick's Estate*, 277 Pa. 242, 121 Atl. 35 (1923). The case was then taken to this Court on a writ of error. The State contended that the Pennsylvania tax was levied only upon property subject to its jurisdiction and that under *Maxwell vs. Bugbee* the State had a right to consider property outside of its jurisdiction in determining the amount of tax which it would levy upon the property wthin its jurisdiction. This Court rejected this contention, saying at pages 494 *et seq*:

> "One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it

would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. **It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important costitutional limitations of no avail.** If Pennsylvania could tax according to such a standard other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. *Western Union Telegraph Co. vs. Foster*, 247 U. S. 105, 114, and cases cited; *Looney v. Crane Company*, 245 U. S. 178, 188; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141; *Air-way Corporation v. Day*, 266 U. S. 71, 81; *Wallace v. Hines*, 253 U. S. 66, 69; *Louisville and Jeffersonville Ferry Company v. Kentucky*, 188 U. S. 385, 395.

"The state court cited in support of its view *Maxwell v. Bugbee*, 250 U. S. 525, 539. **The case is on the border line, as is evidenced by the dissent of four members of the Court.** But it does not go so far as its citation by the state court suggests. The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that State. The stock was part of the estate of a decedent who had resided elsewhere. The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly

without the State the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole. The only bearing which the property without the State had on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was three per cent, that rate was to be applied to the value of the property within the State in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was two per cent. **There was no attempt, as here, to compute the tax in respect of the part within the State on the value of the whole.** The Court sustained the tax, but distinctly recognized that the State's power was subject to constitutional limitations, including the due process of law clause of the Fourteenth Amendment, and also, that it would be a violation of that clause for a State to impose a tax on a thing within its jurisdiction **'in such a way as to really amount to taxing that which is beyond its authority."**

The decision in the *Frick* case was unanimous. It is difficult to draw any convincing substantial distinction between the result in *Maxwell vs. Bugbee* and the result of the *Frick* case. That was the view of the Supreme Court of Pennsylvania which thought the *Maxwell* case applicable in the *Frick* case and considered it equally possible in the *Frick* case to support the State tax in terms merely of imposing a greater amount of tax on what was within the State because of the fact that the decedent had left property outside the State.

In the court below defendants argued that *Maxwell v. Bugbee* was based on, and could still be supported by,

Kansas City R. R. v. Kansas, 240 U. S. 227. But that case rested upon the power of Kansas over a **domestic** corporation. The fact that the corporation was incorporated in Kansas gave Kansas complete power over it as a citizen. This was pointed out by Justice Holmes in the *Maxwell* case where he said (250 U. S. 544):

> "In *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas*, 240 U. S. 227, 235, the State could have refused incorporation altogether and therefore could impose the carefully limited condition that was upheld."

That the *Kansas* case rests entirely upon the power of Kansas over its own corporations is shown by the cases denying the State the right to levy a franchise tax upon a **foreign** corporation not measured by investments or operations within the State. See *Airway Electric Appliance Corporation v. Day*, 266 U. S. 71.

Even if the *Maxwell* case had not been discredited, it would not support the Louisiana statute. Even in the *Maxwell* case, New Jersey only undertook to tax the proportion of the total estate which could fairly be considered within New Jersey. The Louisiana statute goes much further. It puts all the Louisiana stores of a national chain in the highest applicable bracket. If Louisiana can do this, so can every other State. Every store everywhere would be taxed at the highest rates.

Moreover in the *Maxwell* case, there could be no question as to values of property which were reduced to uniform bases by a common denominator of valuations. This is not true under the operations of the Louisiana statute which treats all mercantile establishments, wherever located and whatever their character, as of equal value, an assumption arbitrary on its face and demonstrated to be so by the facts in the record.

(3) The Louisiana Statute Cannot be Supported on the Theory that Louisiana Taxes Only What is in Louisiana by Analogy to Allocation.

The cases permitting an allocation of values for application of franchise and income taxes do not involve any question of **rate** of taxation. The only problem they present is the determination of the *situs* or location of franchise or income. These are intangibles, the *situs* of which may be determined by the application of a fair formula, such as proportions of net income, gross sales and assets, in the absence of proof showing that the statutory formula produces an arbitrary result. In none of the allocation cases was an attempt made to increase the tax upon income, franchise or assets admittedly situated within the State because of the presence of income or assets admittedly situated outside the State, as is attempted by the Louisiana chain store statute involved in this case. In the case at bar there is no problem of determining the *situs* of the stores operated by the parties to this suit or of their operations in Louisiana because these have a physical and local existence.

The Louisiana statute cannot be sustained upon the theory that thereby Louisiana is taxing only the privilege of operating stores within its borders and that Louisiana has a right to regard the number of stores operated outside the state for the purpose of determining the value of the privilege of operating those within the state. Such was the contention of the defendants below. And in support thereof the case of *Wallace v. Hines*, 253 U. S. 66 (1919) was cited. That case not only does not sustain the validity of the Louisiana statute in the light of the undisputed facts disclosed by the record, but on the contrary condemns the Louisiana statute as a taking of property without due process of law.

In *Wallace v. Hines, supra*, there was involved a statute of North Dakota purporting to levy "a special excise tax upon doing business in the state". The subject of the tax was a railroad owning connected lines both within and without the state. In the administration of the law the value of the total property of the railroad was fixed by the total value of its stocks and bonds, and the proportion of such value that the main track mileage in North Dakota bore to the main track of the whole line was taken to represent the capital actually invested in the transaction of business in North Dakota, upon each $1,000 of which a special excise tax of 50¢ was imposed. The court in discussing the validity of this statute said:

> "But, * * * the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases are also outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.
>
> The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless

> it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the possession of bonds secured by a mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—whatever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state."

In this case, as in *Wallace v. Hines*, the statute undertakes to exact what purports to be a special excise tax upon doing business in the state. In this case in determining the quantity of the tax recourse is had to the number of establishments operated by each taxpayer everywhere, both within and without Louisiana. In the *Wallace* case in determining the quantity of the tax, recourse was had to the value of the stocks and bonds of the company regardless of the location of the property which represented the investment of its capital. In this case the operation of each establishment, wherever located and regardless of all other circumstances, is treated as equally contributing to the purchasing power and multiple advantages enjoyed by the operator of such establishments. In the *Wallace* case each mile of track was treated as representing equally the value of the capital invested. In this case the lower court found:

> "Operations of chains doing business in more than one store vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in

all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company." (R. 266).

In the *Wallace* case because of the difference in the cost of construction of the railway in mountainous regions as compared to the plains of North Dakota, because of the location of distributing centers outside of North Dakota, because of the location of great and valuable terminals outside of North Dakota, the court held that the "injustice of assuming the value to be evenly distributed according to main track mileage is plain".

Here, the record shows that while in Louisiana the total annual sales per store of the complainant, The Great Atlantic & Pacific Tea Company, were $42,000, the average annual sales per store everywhere were almost $55,000, and in some instances such sales exceeded $125,000,—in one instance, $800,000 per store. In the case of Montgomery, Ward & Company the average annual sales of its five stores located in Louisiana were $184,803, while the average annual sales of similar Class B stores everywhere was $251,287 per store. In Montgomery, Ward Class A stores the average annual sales were $1,271,118. The average annual sales per store or establishment of the stores of Sears, Roebuck & Company varied from $11,887,080 for its mail order establishments, to $76,123 for its Class C stores, while the average annual sales of its stores in Louisiana varied from $2,667,000 for one of its Class A stores, to $68,691 for a Class B-1 store.

The record shows that the return on invested capital in almost every instance over a period of years and as to each of the appellants was less in Louisiana than upon the average from all stores. The record shows also that

the net annual earnings from operations in Louisiana represented a smaller percentage of sales than such net annual earnings everywhere. The record shows that conditions are less favorable to profitable merchandising operations in Louisiana, which is predominantly rural in character and a large portion of the population of which is negro. The record shows also that there is a wide variation in the class of merchandise sold as between states and sections of the country, and particularly as between Louisiana and foreign nations, because of local customs, tastes and desires, and because of the purchasing power of the community in which the establishments are located.

With these apparent differences disclosed by the findings of the lower court, and by the undisputed evidence, it must be the conclusion that (paraphrasing the language of this court in *Wallace v. Hines*) "so looking only to the number of establishments operated everywhere, the injustice of assuming the value, due to attributes or so-called advantages accruing from multiple ownership and operation of retail stores or establishments, to be evenly distributed, is plain" and does not justify the imposition of an increased quantity of tax in the State of Louisiana in which, from every standpoint, the value of the operation of the stores or establishments is shown to be inferior to the average. Thus under the reasoning and language of *Wallace v. Hines*, the statute of Louisiana is void because it constitutes "a taking of property without due process of law".

Wallace vs. Hines is but one of many cases in which this court has applied the rule that in the application of a statute based upon an allocation theory, it is essential for the State to show that the statute prescribes a fair formula of allocation for determining what is actually within the

state, else the statute will be bad as taxing property or operations outside the state in violation of the 14th Amendment.

The leading case is *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1909). In that case the statute required a foreign corporation, as a condition of its right to do local business in Kansas, to pay a fee based upon a percentage of its total authorized capital, and in holding such statute violative of the Fourteenth Amendment, the court said (page 30):

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent *of its authorized capital* representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state, a condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."
>
> (Italics by the court).

Similar decisions were rendered in *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146 (1910); *Pullman Company v. Kansas*, 216 U. S. 56; and *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U. S. 280 (1912).

In *Looney v. Crane*, 245 U. S. 178 (1917), the court had under consideration Texas statutes which required foreign corporations to pay permit and franchise taxes calculated according to authorized capital stock, and declared them in conflict with the Federal Constitution because they imposed "direct burdens on interstate commerce, and, moreover, asserted the taxing authority of

the state over property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction, and therefore constituted a taking without due process".

In *International Paper Company vs. Massachusetts*, 246 U. S. 135 (1918) a similar Massachusetts statute was set aside. In summarizing the law as established by previous decisions the Court said (page 142):

> "A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, **although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein,** is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.
>
> "When tested, as it must be, by its substance —its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and **also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.**"

In *Airway Corporation vs. Day*, 266 U. S. 71 (1924) this court declared void an Ohio statute which calculated a franchise tax upon authorized capital stock notwithstanding the fact that the statute provided for the calculation of the tax solely upon the proportion of the authorized capital stock represented by property owned and used and business transacted in the state.

In *Cudahy Packing Company v. Hinkle*, 278 U. S. 400, the court had under consideration a statute of Washington requiring corporations to pay annual license fees not above $3,000, reckoned on a graduated basis of authorized capital stock. The Packing Company had an authorized capital stock of $45,000,000, less than $30,000,000 of which had been issued. Its property in the State of Washington had a value of $40,000 and its sales in the year under consideration everywhere aggregated more than $231,000,000, of which slightly in excess of $1,000,000 were made in the State of Washington. In holding that the tax so enacted under the Washington statute violated the Fourteenth Amendment because imposed upon property beyond the state's jurisdiction, the court had occasion to quote from its previous decision in *Alpha Portland Cement Company v. Massachusetts*, 268 U. S. 203 (1925) as follows;

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In the court below defendants relied upon and cited as authority sustaining the Louisiana statute, the case of *Baltic Mining Co. v. Massachusetts, supra*, which, it will be observed from the following quotation, has been expressly overruled.

In *Hans Rees' Sons vs. North Carolina*, 283 U. S. 123 (1930), the Court held:

> "The method of allocating, for taxation, to a State that part of the net income of a foreign corporation which bears the same ratio to its entire net income as the value of its tangible property within that State bears to the value of all its tangible property, works an unconstitutional result if, in the particular case, the part of the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. * * * * *
>
> "The fact that a corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State."

This case emphasizes the need for a formula reasonably adapted to produce a fair allocation. A manufacturer's tax could not be allocated on the basis of the number of factories within and without the state regardless of the size of the various factories or of their location. So merely counting the number of stores as proposed by the Louisiana statute (where it is shown that the stores are not fungible and where they are situated anywhere from across the state border to across the Atlantic Ocean) is not a formula calculated to meet the requirements of the decision in the *Rees* case or in any of the other allocation cases. Allocation is merely a means of determining what property or operations are within a state so as to be subject to its taxing power. This can be done only by a

formula fairly calculated to determine what is within the state. The challenged statute here prescribes no such formula. In looking beyond the borders of the state, no weight is given by the statute to location or character of establishments operated outside the state. An individual or company which operates 1 establishment in Louisiana will have its taxes in Louisiana increased as much by the acquisition of an establishment in Canada or Germany as by the acquisition of an establishment in an adjoining state. The liability to increased tax in Louisiana is the same whether the establishments acquired or operated outside the state are of the same character as the establishment in Louisiana or of a widely dissimilar character. The statute does not attempt to ascertain any relationship between the establishment or establishments in Louisiana and those outside Louisiana, or to make Louisiana's right to taxes depend upon proof of such relationship.

If the Woolworth Company operates an additional store in Germany, Louisiana asserts the right to increase its Louisiana taxes to the same extent as if the additional store were opened in an adjoining state, although the effect upon Louisiana operations of a store in Germany would certainly be far more remote than the effect of a store in an adjoining state.

Under the Louisiana statute, if an individual operated a drugstore in Louisiana and thereafter acquired a millinery store in New York, the drugstore in Louisiana would then be subject to a chain store tax, although the ownership by the same individual of a millinery store in New York could have no possible effect upon the operation of a drugstore in Louisiana.

Similarly, under the Louisiana statute, if a company operates 100 grocery stores in Louisiana and the same

interest, through a subsidiary, opened a retail drygoods store in New York, Louisiana would have the right to demand additional taxes from the company upon each of the grocery stores in Louisiana, notwithstanding the fact that the operation of the drygoods store in New York had no economic bearing upon the grocery stores in Louisiana. *A fortiori* the statute does not take into account any difference between operations in Louisiana and those in other parts of the world, although it is necessarily admitted that such conditions vary widely even from state to state, much more from country to country. See paragraph IX of the Findings of Fact (R. 266), quoted *supra*, at page 34.

This arbitrary phase of the Louisiana statute is specially illustrated by its application to the operations of Montgomery, Ward & Company and Sears, Roebuck & Company, two of the intervenors in this case, whose operations vary widely in character from state to state as well as within the state. These companies operate (a) a few large mail order houses, (b) some mercantile establishments where orders are taken but no stocks carried,[1]

[1]That the Louisiana statute applies not only to ordinary stores but to all establishments is shown by the recent opinion rendered by the Attorney for the Collector of Revenue, September 30, 1936, reported in *Corporation Trust Company Louisiana Tax Service*, paragraph 44-501 to the effect that:

> "Corporations engaged, at different points in the state, in the business of owning and operating ice plants in connection with which ice boxes, ice refrigerators, etc., are sold at retail under the same general management, ownership or control are subject to the chain store tax law."

An ice plant would not ordinarily be considered a store but would nevertheless fall within the general language of the Louisiana statute.

(c) a few large department stores carrying complete lines of general merchandise, and (d) many small stores entirely different in character from the department stores, handling in some instances only automobile tires, hardware and household appliances. The Louisiana tax upon the department store in New Orleans is fixed by reference to the number of mercantile establishments operated everywhere in the world without regard to the character of the operations, and is therefore fixed by the number of stores operated in New York City or Boston selling only automobile accessories or household appliances, as well as by the establishments filling orders through the mail and those where only mail orders are taken. The Louisiana statute gives the same effect in determining the Louisiana tax to a large mail order establishment situated in Chicago or Dallas as it does to a store in New York selling only automobile accessories and household appliances.[2] In the case of the complainant, the same effect is given in fixing the Louisiana rate of taxation, to a store in an adjoining state with one employee and annual sales of $13,500 as to a store at the opposite end of the country having twenty employees and annual sales of $800,000.

An Opinion of the Attorney General of Louisiana Impliedly Recognizes the Arbitrary Character of the Louisiana Statute as Written.

The arbitrary character of the Louisiana statute and the impossibility of supporting it as written is impliedly recognized in an opinion of the Attorney General of Louisiana rendered to the Supervisor of Public Accounts in

[2]The effect of the Louisiana statute upon the interstate commerce business of the mail order houses is discussed in a separate brief filed for Montgomery, Ward & Company.

November, 1936, reported in Prentice Hall Louisiana Tax Service, paragraph 44045, reading as follows:

> "Stores Under Single Ownership but Selling Different Classes of Goods are not a Chain.
>
> "The main advantage that one would have from operating a number of stores would be the purchasing power and privileges. For instance, a person operating several grocery stores would purchase flour, lard and other commodities in carload lots, thereby getting better prices, cheaper freight rates and handling charges. This would not be true of the person who owns several stores, if each store handles a different class of goods or merchandise.
>
> "Certainly, if a department store is not considered a chain, where the various departments carry different kinds of merchandise just the same as different stores carry different articles, then the owner and operator of several stores, each store carrying a separate and distinct line of merchandise, should not be considered as operating chain stores. Op. Atty. Gen. to Sup. Pub. Accts., Nov. 24, 1936."

This construction of the statute cannot be justified by anything in its language. The Attorney General's opinion is an admission of the arbitrary character of the Louisiana statute as written. The statute makes ownership the test regardless of character of stores. The Attorney General's attempt to read into the statute a limitation as to character of stores is as ineffective as would be an attempt to read into it a limitation as to location of outside stores. No such distinctions are contained in the law, and the court must take it as written. *Cf. Lewis Publishing Company vs. Morgan*, 229 U. S. 288 (1913); *Iselin v. United States*, 270 U. S. 245 (1926). The statute as written proceeds upon the proposition that all stores and mercantile establishments are fungible and that the

tax is to be determined solely by reference to the number of establishments without regard to their character. The Attorney General's opinion was based upon his recognition of the "unjustifiable, unequal, whimsical and arbitrary" operation of the Louisiana statute if construed as written (we use the language of this court in *Stewart Dry Goods Company vs. Lewis*, 294 U. S. 550, where the court struck down a Kentucky statute having such a result). The opinion is quite inconsistent with the contention in this case that the Louisiana statute applies to Sears Roebuck & Company and Montgomery Ward & Company, because some of their establishments are really in different lines of business from others. But the unjust and arbitrary quality of the Louisiana statute may be said to be only more obvious in the case of Sears and Ward than in the case of the other parties to this suit, not more basic, because there are wide differences between the Louisiana establishments of the other parties to this suit and their establishments outside Louisiana.

In discussions of chain stores and taxes applying thereto, it is customary to speak of "units". That term is a standard of comparison which implies an equality among the things compared. Obviously, a Ward Class "C" store selling only hardware and automobile tires is not comparable to a mail order establishment. An A. & P. store in Louisiana having one employee and annual sales of $13,500 is not comparable to an A. & P. store in New York having twenty employees and annual sales of $800,000.

The reason the Louisiana statute possesses such an inherently arbitrary character which would not be true of the ordinary chain store statute is because the Louisiana statute extends its orbit outside the state. Where the operation of a statute is confined to what is done within

the state, it will not ordinarily be found that the operations of one owner vary so widely, or that one establishment conducted by him differs so greatly in character from another. But when the entire nation, and indeed the world, is taken as the basis for the statute's operation, one may expect to encounter the great dissimilarities in character of operation by the same owner from state to state and country to country which this record illustrates.

The Louisiana Statute Increases the Louisiana Tax When Louisiana Operations Decrease if Outside Operations Increase. This Could Never Happen Under an Allocation Statute.

Under statutes providing for determining the *situs* of income and franchise by allocation, it is never possible for the rate of tax in one state to be increased merely by increase in income and investments outside the state, while the business and income in the taxing state remains stationary. On the contrary, under such statutes, if investments and income outside the state increase while income and investments in the taxing state remain stationary, the tax in the state will decrease because that much smaller a proportion of total income and investments will be allocated to the taxing state. **The Louisiana chain store tax statute works just the other way.** When operations outside the state increase, Louisiana puts up its tax on what is in Louisiana, although the operations in Louisiana remain unchanged. Indeed, as noted *supra* at page 39, **it is possible under the operation of the Louisiana state, for Louisiana to increase its tax although the number of stores and the extent of operations in Louisiana actually decrease.**

This consideration is, we submit, a complete

demonstration that the Louisiana statute does not proceed upon the theory of allocation and cannot be supported upon that theory. What Louisiana is attempting to do under the challenged statute is not to find out what is in Louisiana and tax that but, in effect, to reach out and subject to the tax in Louisiana what is not there. Whenever such a result has been attempted this Court has struck the attempt down. Compare *Fargo vs. Hart*, 193 U. S. 490 (1904); *Union Tank Line vs. Wright*, 249 U. S. 275 (1919).

The Louisiana Statute Places All Stores Everywhere in the Highest Applicable Brackets.

The absence of any allocation feature from the Louisiana statute of 1937, (which unlike the 1932 statute, is retrogressive) is further illustrated by the fact that, while it purports to establish 16 classes, it puts into the highest applicable bracket each Louisiana store of every corporation also owning stores outside Louisiana.

If Louisiana has a right to do this, then every state has a similar right, and although a corporation owned only 1 store in every state, **that store would be in the highest bracket everywhere.**

If the Louisiana statute is upheld, in pursuance of the policy of exclusion from the state, the brackets of classification may be changed so as, for example, to impose even more nominal taxes on stores falling within the lower brackets and even higher taxes on stores in the higher brackets as a result of the provision that where a corporation operates stores in more than one state, all of the stores in the taxing state shall be put in the highest brackets. Upon the adoption of such a statute in every state, the exclusion from the state of a corporation

operating in more than one state would be even more effectively assured than under the brackets and rates of the present Louisiana statute.

(4) The Louisiana Statute Denies the Equal Protection of the Laws to Chains Operating Both Within and Without Louisiana. The Statute was Not Designed to, and Does Not, Protect Independents Against Chains but Discriminates Among Chains.

The effect of the challenged statute is to greatly reduce the taxes payable by chains operating only or chiefly in Louisiana. Hill Stores operating 87 stores paid under the 1932 statute $200 per store on all stores in excess of 50. Under the 1934 statute, this company pays a tax of $30 on each store. Its total taxes under the 1932 statute were $10,200, while under the 1934 statute, they are $2,610.

Morgan & Lindsey operating 28 stores in Louisiana paid under the 1932 statute $980, while the 1934 statute requires them to pay only $355.

Katz & Besthoff, Ltd., operating 10 drugstores paid under the 1932 statute $200 and under the 1934 statute $100.

These results repel any suggestion that the purpose of the Louisiana statute was to protect the independent merchant against the chains. As a matter of fact the 1934 statute reduced the protection which the operator of one store in Louisiana previously had against such a considerable chain as Hill Stores because it tremendously reduced the differential advantage which, under the 1932 statute, the independent merchant operating 1 store had as compared with Hill. What purpose does it serve to protect the independent from the competition of The Great Atlantic & Pacific Tea Company if his protection as against Hill Stores is so heavily reduced? How would

it advantage the independent by the operation of the 1934 statute to force The Great Atlantic & Pacific Tea Company out of the State, when the only result could be to leave him with less tax protection as against Hill Stores than he previously had? The record shows that Hill Stores do a very much greater gross volume of business in New Orleans as well as a very much greater volume of business per store than does The Great Atlantic & Pacific Tea Company. See paragraph IV of the Findings of Fact (R. 264) quoted *supra* at pages 34, 35.

The Louisiana statute is upon the record obviously not inspired by a desire to protect the independent merchant and could not be supported by any supposed public policy to that end.

It seems in this connection significant that the Louisiana statute is so drawn as to make the first sharp increase in rates only when the number of stores exceeds 100 (Hill has 87).

The foregoing comments apply with substantially equal force to the effect of the challenged statute upon the operations of Katz & Besthoff, Ltd., a local drug chain operating 10 stores in Louisiana as against 6 operated by Liggett. See paragraph XIV of the Findings of Fact (R. 267) quoted *supra* at pages 35, 36.

The intervenor Liggett Drug Company is required under the challenged statute to pay a tax 50 times as great as that of a Louisiana competitor who operates almost twice as many stores in Louisiana as it does, and does more than twice the business. These differentials result solely from the effect given by the Louisiana statute to operations outside the State.

The only privilege which Louisiana gives is that of

operating stores in Louisiana. Louisiana gives Liggett the privilege of operating in 6 places in the State. Katz & Besthoff enjoys the privilege of operating at 10 points in the State. Yet Louisiana charges Liggett aggregate taxes of $3,000 and charges Katz & Besthoff only $100. Louisiana would charge Liggett $500 for operating 1 store in the State, while Katz & Besthoff has the privilege of operating 10 stores in the State for one-fifth of the charge against Liggett for operating 1 store. Katz & Besthoff could operate stores at 100 points in Louisiana for the amount which the State charges Liggett for the privilege of operating at 6 points in Louisiana. To operate 100 stores in Louisiana would cost Liggett $50,000 as against $3,000 to Katz & Besthoff. For the privilege of reaching the number of people that 6 stores in Louisiana can reach, Liggett pays $3,000; Katz $60.

The facts reviewed under this heading show the lack of foundation for the justification of the Louisiana statute urged by a member of the Louisiana Legislature in his affidavit (R. 252) in which he recites that the purpose of the 1934 Louisiana statute was to protect independent retailers against chains, saying:

> "Affiant further states that when an individual citizen of Louisiana is unable to operate by reason of chain operations in his respective community, such a condition operates against the general welfare of the State of Louisiana and is a condition which the Legislature of Louisiana should take cognizance of and rectify, and it was these conditions and circumstances that the Legislature had in mind in the passage of the Act attacking the present litigation."

The record shows that the number of independent retailers in Louisiana has decreased less than the number

of chain units. But if the independent retailer needs protection against chains, the protection he requires is against the local chains at least as much as the foreign chains. The new Louisiana statute relaxes that protection and actually gives Hill Stores, for example, a far greater leverage in competition against the independent retailer than was the case under the 1932 statute under which Hill paid graduated rates ranging up to $200 for every store in excess of 50 whereas under the 1934 statute, it pays only $30 per store.

That the competition against which the independent merchant of Louisiana desires to be protected is the competition of the local chain rather than of the large chain is shown by the affidavit of Mr. A. A. Allen of Baton Rouge (R. 202), offered by the defendants, in which he complains of the methods of competition used by a chain which the record otherwise (R. 95) shows to be a **local** chain operating **solely in Louisiana** with 17 stores in Baton Rouge, (as compared with plaintiff's 6 stores). This local chain is actually benefited and strengthened in its competition with independent merchants such as Mr. Allen by the provisions of the 1934 statute as compared with those of the 1932 statute.

In our analysis of the testimony, we have pointed out that the rate of tax on the Great Atlantic & Pacific Tea Co. per store in Louisiana is almost 20 times the rate of tax on Hill Stores. Similarly the rate of tax on each Louisiana store of Liggett is 50 times the rate of the Louisiana tax on Katz & Besthoff and the rate of tax on each of the Penney and Woolworth stores is almost 30 times the rate of tax on each Morgan & Lindsey store although Morgan & Lindsey operate 28 stores in Louisiana as compared with 14 stores operated by Woolworth and

8 operated by Penney. H. L. Green Company pays 5 times the tax on its Louisiana store that Morgan & Lindsey pay on each of their Louisiana stores although Morgan & Lindsey operate 28 times as many stores in Louisiana as Green. The record fails completely to show any advantages or differences in method of operation as between Hill and the Great Atlantic & Pacific Tea Co. which would support a differential of almost 20 times in tax or a discrimination between Liggett and Katz & Besthoff of 50 times in tax or even a discrimination between Green and Morgan & Lindsey of 5 times in tax, even if the State were conceded the right in effect to tax operations outside its borders by making them the controlling test in determining the rate of taxation upon operations within its borders.

The following table summarizes the number of stores operated in Louisiana of certain of the parties to this litigation and certain of their competitors and the taxes payable by them respectively under the Louisiana statute.

	Number of Stores	*Total Taxes*
Great Atlantic & Pacific Tea Company	106	$58,300
Hill Stores	87	2,610
Liggett Drug Company	6	3,000
Katz & Besthoff	10	100
F. W. Woolworth	14	7,700
Morgan & Lindsey	28	560

The fact that Hill Stores is successfully operating 87 stores in New Orleans in competition with the 63 operated by the A. & P. in that city, is in itself sufficient to refute the contention that a national chain can drive a local chain out of existence. The same comment applies to the 10 drug stores of Katz & Besthoff and the 15 stores of Economical Drug Stores operated in competition with

Liggett, as well as to the 28 stores operated by Morgan & Lindsey in competition with various intervenors in this case. The effect of a statute like the Louisiana statute is merely to give further opportunities for greater profit to these already thriving local chains. But the State cannot consistently with the Constitution undertake to benefit or give advantage to its citizens or those doing business only within its borders by discriminating against those who also do business elsewhere. *Ward v. Maryland*, 12 Wall. 418, 430, cited with approval in *Colgate v. Harvey*, 296 U. S. 404, (1935) *supra*.

(5) If the Louisiana Statute is Upheld, a State May Make Its Tax Rates Applicable to Income and Operations Within the State Depend upon Factors Outside the State. The Result Would be to Permit the State in Effect to Exclude from the State Persons or Corporations Operating Outside the State, and to Convert the Union into a Confederation of States.

The argument of defendants is that the complainant and each of the intervenors enjoys a more valuable privilege in Louisiana by operating a limited number of stores there because of the ownership of other stores elsewhere. If this argument is sound, then it may be equally argued that the Louisiana business of a New York life insurance company is more valuable than the Louisiana business of equal extent of a local insurance company which does no business outside Louisiana. A Louisiana life insurance company doing business in Louisiana and collecting $500,000 in premiums there might be required to pay a rate of only 2% upon such premiums, while the New York insurance company also collecting $500,000 in premiums accruing in Louisiana but $5,000,000 of income accruing outside of Louisiana might be required to pay Louisiana 10% upon its Louisiana income on the theory

that it was more valuable to have a $500,000 business in Louisiana if the business was part of a $5,000,000 total than if the business was not part of such a total.

If Liggett's 6 units in Louisiana are more valuable than the 10 Louisiana units of Katz & Besthoff (notwithstanding the fact that Katz & Besthoff does a much greater volume of business, makes much more money and enjoys every buying advantage that Liggett enjoys) merely because Liggett operates also other stores outside Louisiana, then why is it not equally true that a $500,000 business in Louisiana of Metropolitan Life Insurance Company is more valuable than an equal amount of Louisiana business of a local life insurance company, solely by virtue of the fact that the Metropolitan Life Insurance Company has a large business outside of Louisiana? It is, if anything, more likely that the Louisiana offices of the Metropolitan Life Insurance Company benefit from the extensive business that that company does in other states than that the Louisiana units of Liggett, for example, benefit from the outside units of Liggett, or that the Louisiana units of Woolworth benefit from the Woolworth units existing in Germany, Great Britain, Cuba and Canada.

If Louisiana can determine the rate of taxation upon a corporation like Woolworth having 14 stores in Louisiana by reference to the stores which Woolworth operates outside Louisiana, what logical reason may be found to preclude Louisiana from taxing the income of Woolworth in Louisiana at a higher rate than would be applied to an equal amount of income accruing in Louisiana to a corporation which had no income outside Louisiana solely because of the fact that Woolworth had large income accruing outside Louisiana? It is argued in behalf of the Louisiana chain store statute that it is a tax against size

designed to compensate the small chain for the advantages which the large chain enjoys. If the tax is to be maintained on the theory of permissible discrimination against size, notwithstanding the fact that the size results from operations outside the State, then no reason suggests itself why the discrimination against size should not be carried to a further extent by permitting a State to provide that income accruing within a State should be taxed at a higher rate to a corporation which has large sources of income from outside the State than would be permitted in the case of a corporation which had only an equal amount of Louisiana income and no income from outside the State. So also if each State is to be permitted to penalize size resulting from operations outside its borders, there would seem to be no logical reason why a State should not be permitted to tax capital of a corporation invested in the State at a higher rate because of the fact that the corporation has large capital outside the State.

In such cases the same argument might be made as is made in support of the challenged Louisiana statute in this case, namely that it is a greater privilege to be permitted to do business in Louisiana if you do a large business outside Louisiana than if you do not because of the advantages of reduction in overhead expenses and other gains contended to result from size. Similarly it would appear that, if the present Louisiana chain store statute is valid, Louisiana might amend its general license tax law, which provides for graduated license taxes on gross sales within Louisiana, so as to fix the rate of such taxes by reference to the total sales of the seller outside Louisiana. Thus a corporation selling $100,000 of goods in Louisiana for one year, but which had gross sales of $1,000,000 for its entire system, might be required to put

its sales in the upper brackets of a graduated license tax with the result that it would be required to pay general license taxes far exceeding those payable by a corporation which sold $100,000 worth of goods in Louisiana and had not sales elsewhere. The theory on which it is contended that the present Louisiana chain store tax law can be supported, namely that one conducting extensive business outside Louisiana derives a greater privilege from doing business in Louisiana than one who does not, and that the Louisiana operations of the outside operator are more valuable than the Louisiana operations of one who confines his activities to Louisiana, would be equally applicable to the case of a license tax upon sales.

Granting the purpose of the Louisiana statute to destroy large chains by taxation which discriminates against size resulting from operations outside the state, a corresponding purpose would be served by applying the Louisiana theory to license taxes as well as to taxes on insurance premiums, franchise taxes and every kind of privilege tax because it might as to all such taxes equally be argued that an individual or corporation doing business in a number of states has supposed advantages which every state should be permitted to remove by taxation based upon the entire extent of the operations of the corporation or individual.

This Court has, in a series of decisions, referred to *supra*, denied the power of a state to calculate a franchise tax by reference to all the capital stock of a corporation representing all of its business and property both within and without the state, and has rejected the contention that such taxes should be upheld on the theory that the state had a right to impose taxes so calculated as a condition upon the right of the corporation to do business

within the state. But, if it is true that the value of the privilege of doing business within the state is greater because of operations outside the state, it would seem that these cases were wrongly decided; the state is not required to adjust taxes with precision, and if it is more valuable to a large corporation to do business in Louisiana than it is to a small corporation, then in the cases referred to, the taxes should have been upheld. A contrary decision was, however, reached in each of the cases in which the point was presented.

If a state may exclude by discriminatory and confiscatory taxation any corporation which has extensive operations outside the state, each state will then exist for itself and the Union will become a Confederation of States, each of which may erect an economic wall parallelling its boundaries. Such a result will be as destructive of the theory of our national government as any interference by individual States with the flow of commerce between them could be. In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), holding that New York was without power to prohibit the sale in New York of milk purchased in Vermont if the price paid for it in Vermont was less than would be owing in like circumstances to farmers in New York, Mr. Justice Cardozo said:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' * * * ** Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of

the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' * * * If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. * * * * Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. **To give entrance to that excuse would be to invite a speedy end of our national solidarity.** The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division. * ** * **What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.** Formulas and catch words are subordinate to this overmastering requirement. * * *"

The case cited involved a principle which underlies our whole government structure and is equally applicable whether the case arises under the commerce clause or under the 14th Amendment, and the language of Justice Cardozo just quoted is in substance directly applicable to the situation which would result from recogniz-

ing a right in a State to fix its rates of taxation on property within its borders by reference to property outside its borders. The argument in the instant case that Louisiana is entitled to protect local chains against competition with national chains corresponds to the argument in the case cited that New York should be permitted to protect the economic welfare of her farmers against competition with the cheaper prices of Vermont. If the Constitution was

> **"framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division,"**

a statute framed upon the theory and designed for the purpose of the Louisiana statute cannot be maintained.

In considering the argument in this case that Louisiana is justified in discriminating against size, even where the size results from operations outside its borders, it should be borne in mind that this Court has held that a tax based upon size alone, as e.g. a graduated tax upon gross sales, is arbitrary and invalid; see *Stewart Dry Goods Company vs. Lewis*, 294 U. S. 550 (1935), where the Court said at page 560:

> "If, as argued, larger merchants are more efficient, their efficiency will be correspondingly reflected in their net earnings. If, as claimed, they are able to procure better management, a tax upon gains will uniformly reflect the effects of such management. And the same principle holds true of every advantage said to inhere in the magnitude of a business."

Stripped to the ultimate point, this case involves this question: May a state exclude a foreign corporation from

doing business in the state because of the extent of its operations outside the state? May a State say to a large corporation: "We prefer not to have within this state a corporation which operates extensively outside the state. The operation of such a corporation within the state will make competition difficult for our local corporations, and we prefer that the local corporations should enjoy the local field exclusively."

The maintenance of the Louisiana statute involved in this case will require an affirmative answer to this question. It will also require an affirmative answer to the same question when applied to an individual conducting extensive operations outside the State. The State may exclude him also by calculating its taxes upon his outside operations. The Louisiana statute expressly applies to individuals.

The Right of Louisiana to Exclude a Foreign Corporation Cannot Be Used as a Basis for Taxing it Upon Property that, By Established Principles, the State Has No Power to Tax.

Defendants in the lower court contended that since the complainant and each of the interveners in this case are foreign corporations doing intrastate business in Louisiana, the privilege of engaging in such business in corporate form is one which the state may confer or withhold as it sees fit, that the state had the right to impose as conditions to doing such intrastate business in Louisiana the terms of the Louisiana statute challenged. This contention is not new and has heretofore been directly denied by this Court. In *Fidelity & Deposit Company of Maryland v. Tafoya*, 270 U. S. 426 (1926), this Court said:

> "Coming then to the merits, we assume in favor of the defendants that the State has the

> power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some instances become wrong. * * * **Thus the right to exclude a foreign corporation cannot be used * * * to tax it upon property that by established principles the State has no power to tax.** * * * "

In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928), this Court had under consideration a Pennsylvania statute imposing a tax of 8 mills upon the dollar upon all gross receipts realized by any transportation company from passenger and freight traffic wholly within the state. Plaintiff was a New Jersey corporation, authorized to do and engaged in a general taxicab business in Philadelphia. It was competing generally with both individuals and partnerships operating taxicabs in that city. The court held that the statute, taxing the gross receipts of plaintiff and exempting those of its competitors, denied to plaintiff the equal protection of the law, contrary to the 14th Amendment, and, speaking by Mr. Justice Roberts, said (p. 400):

> " * * * It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. **The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution.** ***Power Co. v. Saunders, supra, 497. Hanover Insurance Co. v. Harding, 272 U. S. 494, 507. Frost v. Railroad Commission, 271 U. S. 583, 593, et seq. Fidelity***

& Deposit Co. v. Tafoya, 270 U. S. 426, 434. Western Union Tel. Co. v. Foster, 247 U. S. 105, 114. Looney v. Crane Co. 245 U. S. 178, 188., Sioux Remedy Co. v. Cope, 233 U. S. 197, 203."

Prohibition of Size Extending to Operations Outside the State may Properly be Accomplished Only by National Legislation.

It may be argued that discrimination against size is wise and that a legislative policy to that end should not be interfered with by the Court. But under our system of government, it is not within the power of a state to control anything but what takes place within its borders. If size transcends the borders of the state, the remedy is in national, not state legislation. The national legislative power may be exerted through the exercise of the power over interstate commerce. The activities of the Federal Trade Commission in its investigation of chain stores and the recent enactment by Congress of the Robinson-Patman Act prohibiting price discrimination (Act of June 19, 1936, Public No. 692, 15 USCA Sections 13, 13-A) are immediate illustrations of the exercise of national power over chains. Insofar as there is any legitimate complaint against undue advantage in purchases by large chains like The Great Atlantic & Pacific Tea Company, Congress has undertaken to apply a remedy which it deemed to be required. From no standpoint is there any justification for the unwarranted extension of state power. The diference between the power of the state and the power of the United States was pointed out by this Court in *United States vs. Bennett*, 232 U. S. 299 (1913), at page 306, where the Court said:

> "* * * ** The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and pro-

tected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends, the authority of the other begins. * * * *."

If the Louisiana Statute is Valid, Municipalities May Adopt Corresponding Ordinances Based on Operations Outside State, Further Assuring Exclusion of Foreign Chains.

Under the constitution and laws of Louisiana, any municipality in which a corporation does business may establish a license tax not exceeding the license tax of the State. If the 1934 Louisiana statute is upheld, then the City of New Orleans may adopt a similar ordinance taxing the plaintiff in this case by the number of stores which it operates in the world so that the tax per store upon the plaintiff would then become $1,100.00 while the tax per store upon Hill Stores would be $60.00. A corresponding result may be reached by each municipality throughout the State in every town where the plaintiff and each of the intervenors do business. This is merely cumulative evidence of the fact that a judicial declaration of the right of the State to fix taxes upon property and operations within its borders by reference to property and operations outside its borders will in effect constitute a declaration of the right of each State to restrict business within its borders to those who operate only within those borders and to exclude all others. What may happen in Louisiana may also happen through the country because the right of municipalities to enact chain store ordinances exists in many States. In at least one city outside Louisiana, an ordinance modeled upon the Louisiana statute had already been proposed prior to the submission of this case in this Court.

Every Legitimate Claim of Louisiana to Lay Tribute Upon Operations Within its Borders is Attained Under the State Income and Franchise Tax Laws, the 1932 Chain Store Act, and the General License Tax Laws.

Every legitimate claim which the State of Louisiana may have to lay tribute upon the operations by plaintiff and intervenors within its borders, is satisfied by the State income tax law, the State franchise tax law, the general retail license tax law and a chain store tax based upon operations within Louisiana.

Louisiana has an income tax statute (Act 21 of the Louisiana Legislature of 1934 amended by Act 7 of the Second Special Session of 1934 and Act 21 of the First Special Session of 1935). Every one of the corporations which is a party to this suit is subject to the provisions of this income tax statute. Section 34 of this statute provides for the allocation of income of foreign corporations to sources within or without the State of Louisiana under rules and regulations prescribed by the Supervisor of Public Accounts. The rules and regulations so prescribed permit a foreign corporation to make its own allocation of income on a fair and equitable basis and provide in the alternative for a statutory allocation of total income based upon that proportion of income which Louisiana tangible assets, wages and sales bear to total such items. See regulations appearing at page 1155-25 of Corporation Tax Service for Louisiana. Insofar as the plaintiff and intervenors in this case derive income from sources in Louisiana, the Louisiana income tax statute reaches such income.

Louisiana has also a franchise or capital stock tax statute, originally adopted as Act No. 8 of the Legislature

of 1932 amended by Act 18 of 1934 and further amended by Act 25 of the First Special Session of 1934, Act 20 of the Third Special Session of 1934 and Act 10 of the First Special Session of 1935. This statute provides for an allocation to Louisiana of that proportion of a foreign corporation's capital stock which may be obtained by taking the arithmetical average of (a) ratio of property and assets in Louisiana to total assets and (b) ratio of volume of business done in the State to total volume of business. The plaintiff and intervenors are also subject to the provisions of this statute and, insofar as their capital stock has a *situs* in Louisiana, it is taxed under this statute.

Neither the income tax statute nor the capital stock tax statute undertakes to increase the rate of tax upon income accruing in Louisiana or capital stock situated in Louisiana by reference to the income which the corporation has outside Louisiana or the amount of capital it has invested outside the State. That, however, is precisely what the chain store tax under consideration here undertakes to do.

Louisiana has also a general license tax to which the plaintiff and the intervenors in this case are also subject, which requires everyone selling merchandise at retail to pay a graduated license tax fixed by reference to gross sales; see Dart's Louisiana General Statutes, §8588 and following. The plaintiff and each of the intervenors is also subject to a corresponding municipal graduated license tax on gross retail sales in each municipality in which business is done; see Dart's Louisiana General Statutes, §8631.

The Invalidity of the Louisiana 1934 Statute Will Leave the 1932 Statute in Effect.

We have conceded that upon a decision holding in-

valid the 1934 statute, the tax provided for by the 1932 Louisiana statute will be effective. This is conceded in the original bill of complaint and in the intervening bills, wherein it is alleged that the plaintiff and intervenors have tendered to the State the taxes which would have been due under the 1932 statute and that such tender has been declined. Upon a decision that the 1934 statute is invalid, the State will receive all the chain store taxes to which it is legitimately entitled from the plaintiff and intervenors through the tax provided for in the 1932 tax, which, like every other chain store statute in existence in the United States, is based upon operations within the State.

The preceding discussion, is, we think adequate to indicate that a decision declaring the Louisiana 1934 statute invalid may be rested upon the commerce clause as well as upon the 14th Amendment of the Federal Constitution. The commerce clause has however particular application to operations of the Louisiana statute insofar as it affects the mail order business of Montgomery Ward & Company and Sears Roebuck & Company, and a short separate memorandum discussing this particular phase of the position of these companies will be filed in behalf of Montgomery Ward & Company.

Just as this brief is about to go to press, we have been given the opportunity to see a copy of the brief of appellees. We desire to make the following brief rejoinder.

(a) In point VI at page 98 of their brief, appellees contend "in the alternative" that the Louisiana statute may be supported as a classification of chain operating in Louisiana as local, sectional and national chains, referr-

ing to the language in the majority opinion and one of the dissenting opinions in *Liggett vs. Lee*, 288 U. S. 517. **The Louisiana statute does not make any such classification.** If a corporation or individual owns one store in Louisiana and another in New York, the Louisiana statute treats the situation precisely as if one of the stores were in Louisiana and the other in Mississippi. The Census Bureau classification referred to in the quoted language from the *Liggett* case was based on geographical classification. The Louisiana statute takes nothing into account but number of establishments, irrespective of geographical location. The Louisiana statute is directed solely against size outside the State, wherever the size may be.

(b) The appellees' argument in point VIII at page 101 with reference to the Robinson-Patman Act is beside the point. We are not contending that the passage of the Robinson-Patman Act changes the legal situation. We refer to that Act as illustrating and making vivid our contention that prohibition of size incident to operations outside the State may properly be accomplished only by national legislation. Our point is solely that Congress has the power to regulate matters beyond the jurisdiction of the states. It has in fact undertaken to exercise this power, but the validity of our argument would not be affected if it had not undertaken to do so, or if it has not yet exercised it to the fullest extent.

(c) In the list of corporations appearing at page 97 of appellees' brief, there appear Firestone Tire & Rubber Company, Goodyear Tire & Rubber Company and General Electric Company. These corporations are not parties to the present suit. Counsel have agreed that the State's claims against them shall be held in abeyance until the decision in this case is rendered. The record, as far as we are advised, contains no figures with respect to them. **No one**

would think of them as chain stores and they are not even classified as mercantile enterprises in the work cited by appellees. They sell only or chiefly their own products and their establishments in Louisiana are solely outlets for such products. It is indicative of the far-reaching character of the Louisiana statute that it would reach them upon a basis which would tax each of their Louisiana outlets at the rate of $500, or more, although no one of them has more than 6 outlets in Louisiana (Goodyear Tire & Rubber Company and General Electric Company having each only 3 such outlets). Their assets are chiefly invested in manufacturing plants and we believe that there is no basis for including the assets of these corporations in making a summary of resources of chain stores. The assets shown by them in appellees' table account for the bulk of the total there shown. The inclusion of these figures in the appellees' brief confirms our contention that the Louisiana statute is directed not against chain stores, but against size outside the state.

(d) In point VII, page 100 of their brief, appellees seek to avoid our contention that the principal of the Louisiana statute may be extended to income, franchise and other taxes on the ground that this court has already held that there is sufficient difference in the methods of operation used by chains to justify classification according to the number of stores, and that it is immaterial whether, as far as the present case is concerned, this same classification would be held valid for other types of business. But the decisions of this court heretofore rendered relate only to separate classification and taxation of chain stores according to their operations within the state. This Court has correspondingly maintained graduated net income taxes applying solely to income accruing within a

state. Compare *United States Glue Company vs. Oak Creek*, 247 U. S. 321. But the present case goes beyond the confines of the state, and the Louisiana statute cannot be supported upon the ground that it only classifies units within the state. If the Court should decide in the present case that the tax on chain stores, classified as such within the state, may be increased because of the existence of establishments outside the state, no argument has been suggested against the application of a corresponding doctrine in the case of income and franchise taxes on operations within a state. In reaching a conclusion as to the validity of the Louisiana statute, this Court is bound to consider the effect of the decision in this case upon the power of a state in other cases to increase taxes on what is within its borders by reference to what is outside.

(e) None of the cases cited in appellees' brief support the Louisiana statute.

Tax Commissioners vs. Jackson, 283 U. S. 527 (1931) sustained by a 5 to 4 decision the right of Indiana to impose a tax upon chain stores regulated solely by the number of units within the state without any attempt by the state to increase the rate by reference to the number of stores outside the state. *Fox vs. Standard Oil Company*, 294 U. S. 87 (1935) was also a 5 to 4 decision to the same effect. *Liggett vs. Lee*, 288 U. S. 517 (1933) invalidated a Florida chain store tax, although it was confined to the borders of the state, because it was based upon an arbitrary discrimination as to locations within counties. The dissenting opinion of Mr. Justice Brandeis urging the maintenance of the statute as a justifiable discrimination against size was directed only to size within the state and does not suggest that the state's power should be extended to prohibit size of operations outside the state. This dissent was not concurred in by any other member

of the court. That the majority of the court does not agree with the view that even within a state a discrimination may be established against a corporation solely because it is a corporation is shown by *Quaker City Cab Company vs. Pennsylvania*, 277 U. S. 389 (1928). The Louisiana statute moreover is not confined in operation to corporations.

In *Railway Express Company vs. Virginia*, 282 U. S. 440 (1931) cited at page 95 of the appellees' brief, the court was careful to say:

> "There is not here, as there was in Western Union Telegraph Company vs. Kansas, 216 U. S. 1 and Pullman Company vs. Kansas, 216 U. S. 56, a deliberate attempt to use the State's powers as the means for attaining the unconstitutional result of **taxing property outside the State.**"

Educational Films Company vs. Ward, 282 U. S. 379 (1931) cited at page 92 of the appellees' brief, involved the power of New York over a **domestic** corporation.

With respect to *Horn Silver Mining Company vs. New York*, 143 U. S. 305 (1892) cited at page 96 of the appellees' brief, it was said by this court in *Hanover Fire Insurance Company vs. Carr*, 272 U. S. 494, at page 507:

> "It was settled in * * * Horn Silver Mining Company vs. New York, 143 U. S. 305, that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. **But there is a very important qualification to this power of a state,** the recognition and enforcement of which is shown in a number of decisions in recent years. **That qualification is that the state may not exact as a condition of the corporation's engaging in business within its lim-**

> **its that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated * * * * in cases in which the state has vainly attempted to subject foreign corporations to a payment of a tax which is a tax** not only upon the property of the corporation in the state but also **on its property without the state,** in violation of the due process clause of the Fourteenth Amendment. * * * * *"

See also *Quaker City Cab Company vs. Pennsylvania,* 277 U. S. 389 (1928); *Fidelity & Deposit Company of Maryland vs. Tafoya,* 270 U. S. 426 (1926) heretofore cited.

Other citations in appellees' brief are, we believe, sufficiently met by our principal discussion and further rejoinder appears unnecessary.

SUMMARY AND CONCLUSION

We respectfully submit that the preceding argument fully supports, and indeed requires, the following conclusions:

First: A State cannot tax operations beyond its borders

Second: A State cannot by language or indirection accomplish an unconstitutional purpose or use a so-called right as part of a scheme to accomplish a forbidden result. The practical result and effect of the statute, not its form, is controlling.

Third: The Louisiana statute of 1934 in design and effect taxes operations outside of Louisiana. A corporation is required to pay increased taxes to Louisiana solely by virtue of what it does outside of Louisiana. A corporation, firm or individual may actually decrease its

operations in Louisiana and yet be required to pay increased taxes to Louisiana because of what is done outside Louisiana.

Fourth: The Louisiana statute is especially arbitrary in taxing operations outside Louisiana irrespective of the remoteness of those operations, their character or connection with operations within Louisiana, and in proceeding upon the theory that mercantile establishments are fungible and that all stores everywhere are of the same character and value. The Louisiana statute cannot be supported upon any theory of allocation. It prescribes no formula calculated to restrict the burden of the Louisiana tax to values resulting from Louisiana operations and fairly ascribable to Louisiana. The Louisiana statute does not undertake any classification of chains into national, sectional and local; it gives no weight whatsoever to geographical location.

Fifth: Recognition of the right of Louisiana to tax operations outside its borders would give every State far reaching power to exclude foreign corporations and also individuals by erecting economic barriers along its borders.

Sixth: The Louisiana statute does not represent any policy to protect, and was not designed to, and does not in fact, protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other States.

Seventh: Every legitimate claim of Louisiana against plaintiff and intervenors is satisfied by the Chain Store Act of 1932, the General License Tax Law, the Income Tax law and the Corporation Franchise Tax law. The Chain Store Act of 1934 presents an unconstitutional attempt to

obtain further revenues for the State by an extra-territorial tax on operations outside the State.

On these grounds we submit that the judgment below should be reversed and the Louisiana statute of 1934 should be declared invalid and its enforcement against complainant and intervenors permanently enjoined.

Respectfully submitted,

JOSEPH G. GAMBLE,
J. BLANC MONROE,
MONTE M. LEMANN,
Attorneys for Complainant and Intervenors.